Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CITY OF DALLAS,

Petitioner,

v.

PETER T. COLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER D. BOWERS
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

Attorney for Petitioner

172012

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

85M

QUESTION PRESENTED

This case presents the same question that is currently before the Court in *Ours Garage and Wrecker Service v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-419), which is whether 49 U.S.C. § 14501 permits cities to enact safety regulations regarding local tow truck operations, as the Second Circuit and the California Court of Appeals have held, or pre-empts such regulations, as the Fifth, Sixth, Ninth, and Eleventh Circuits have held.

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OPINIONS AND ORDERS BELOW

The per curiam opinion of the court of appeals is not reported.[1] (App. A.) The district court's final judgment is not reported. (App. B.) The district court's memorandum opinion and order is not reported. (App. C.)

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 9, 2001. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Federal Aviation Administration Authorization Act of 1994 ("FAA Authorization Act") amended the Interstate Commerce Act ("ICA") at 49 U.S.C. § 11501(h). The Interstate Commerce Commission Termination Act ("ICC Termination Act") recodified 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c). (App. E.) Section 14501(c) now provides in pertinent part:

> **(c) Motor Carriers of Property.** –
>
> **(1) General rule.** – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> **(2) Matters not covered.** – Paragraph (1) –
>
> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight

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1. For the Court's convenience, "App." refers to an appendix at the end of this petition, and "R." refers to the clerk's record of the proceedings in the U.S. District Court.

> of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> **(B)** does not apply to the transportation of household goods; and
>
> **(C)** does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Section 643.201(a) of the Texas Transportation Code (App. E.) provides:

> In addition to the registration requirements of Subchapter B, a municipality may regulate the operation of a tow truck to the extent allowed by federal law.

City of Dallas ("City") Ordinance No. 24175 re-enacted and codified the City's regulations for vehicle tow services in Chapter 48A of the Dallas City Code. Section 48A-13(a)(7) of the Dallas City Code provides in pertinent part:

> To qualify for a wrecker driver's permit, an applicant must . . . not have been convicted of a crime . . . involving . . . a violation of the Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law . . . for which . . . less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense.

The relevant parts of this ordinance are in the appendix. (App. D.)

STATEMENT OF THE CASE

A. Background

This case presents the same important and recurring public safety issue that is now before the Court in *Ours Garage and Wrecker Service v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (U.S. Jan. 4, 2002) (No. 01-419), which is whether 49 U.S.C. § 14501(c) pre-empts cities from promulgating safety regulations regarding municipal tow truck operations.

In addition to *Ours Garage*, there are two pending petitions before the Court that present the identical issue. *See California ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App. 2001), *review denied* (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336); *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028).

For many years, virtually all major cities in the country have required tow truck companies, their drivers, and their equipment to meet specific safety standards before engaging in the business of towing wrecked and disabled motor vehicles. Cities adopt these standards to protect the public from unsafe towing practices. Tow truck safety regulation and licensing is an area that has traditionally been the province of local governments under our system of democracy.

In 1994-95, Congress enacted the FAA Authorization Act and the ICC Termination Act for the purpose of deregulating the motor carrier industry. Since 1995, five circuit courts, many state courts, and several lower courts have struggled to apply these Acts to local government laws governing tow trucks. After almost seven years of litigation across the country on this issue, the Fifth, Sixth, Ninth, and Eleventh Circuits have held that 49 U.S.C. § 14501(c) preempts cities from enacting safety regulations regarding tow truck operations, while the Second Circuit and the California First District Court of Appeals have held that cities are not pre-empted from adopting such regulations.

B. Statement of Facts

This case concerns one such public safety ordinance. On January 26, 2000, the Dallas City Council passed Ordinance No. 21175, which repealed and re-enacted Chapter 48A of the Dallas City Code. (App. D.) The ordinance governs nonconsensual towing of motor vehicles from private property. Its purpose is to protect "the public interest as it relates to the parking of vehicles on private property and to the removal of those vehicles to vehicle storage facilities without the consent of the vehicle owners or operators." (App. D at 16a.) The ordinance's preamble gives several reasons why the ordinance promotes public safety. (App. D at 14-15a.) The preamble also indicates that the City Council was aware of its limited power to regulate nonconsensual tows under federal law. (App. D at 13a-14a.) The ordinance includes, but is not limited to, licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements. (App. D at 14a.) The ordinance specifically prohibits persons from receiving wrecker driver's permits to tow motor vehicles if they have been convicted of violating the Texas Controlled Substances Act, or a comparable law, that is punishable as a felony, and less than five years have elapsed since the date of release from confinement for the conviction. (App. D at 17a-18a.)

In this case, Peter T. Cole ("Cole") pleaded guilty to delivery of a controlled substance (cocaine), a felony, and was sentenced to ten years in prison in 1994. (R. Vol. 1, p. 219.) He was released from prison and sentenced to ten years of "shock probation" later that year.[2] (R. Vol. 1, p. 219.) Three years later, Cole's probation was revoked and he was sentenced to five years in prison. (R. Vol. 1, p. 219.) He was released from prison on January 5, 1999. (R. Vol. 1, p. 215.)

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2. "Shock probation" describes a trial court's action in suspending further execution of a prison sentence and placing the defendant on community supervision within the first 180 days after a defendant is sentenced. Tex. Code Crim. Proc. Ann. art. 42.12, § 6 (Vernon Supp. 2002).

Little more than a year later, Cole applied for a wrecker driver's permit. (R. Vol. 1, pp. 214-15.) Based on Section 48A-13(a)(7) of the Dallas City Code, city staff denied his application due to his recent confinement for the felony. (R. Vol. 1, pp. 210, 213.) Cole administratively appealed the denial to an assistant city manager, who upheld the denial. (R. Vol. 1, p. 206.) Cole's disqualification under Section 48A-13(a)(7) will end on January 5, 2004, assuming he is not convicted of such a crime between now and then.

C. Proceedings Below

Cole filed this action in state court on July 25, 2000, asserting that Chapter 48A of the City Code was pre-empted by 49 U.S.C. § 14501(c). He further alleged that the City's enforcement of Chapter 48A deprived him of due process of law and equal protection of the law. He sought injunctive and declaratory relief, damages, attorneys' fees, and costs. (R. Vol. 1, pp. 8-20.)

The City denied the allegations, then timely removed this action to the U.S. District Court for the Northern District of Texas on August 8, 2000, because the action concerned matters of which that court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). (R. Vol. 1, pp. 1-7.) The next day, that court heard oral argument on Cole's request for a preliminary injunction. (R. Vol. 2, pp. 1-29.) The court thereafter entered a memorandum opinion and order, which denied Cole's request for a preliminary injunction. (App. C.)

Cole then moved the district court to enter judgment against him and to make findings of fact and conclusions of law. (R. Vol. 1, pp. 154-57.) Cole and the City next stipulated to some basic facts. The district court then entered a final judgment, which was based on the parties' stipulations and the written findings of fact and conclusions of law in the court's memorandum opinion and order. (App. B.) Cole timely appealed to the Fifth Circuit. (R. Vol. 1, pp. 234.)

While Cole's appeal was pending, the Fifth Circuit issued its opinion in *Stucky*. The *Stucky* court acknowledged

"the closeness of the issue and the soundness of the arguments on either side" of "this difficult [pre-emption] issue," but concluded that 49 U.S.C. § 14501(c) pre-empted San Antonio's tow truck ordinance. *Id.*, 260 F.3d at 440, 446. Based on *Stucky*, the Fifth Circuit then vacated the district court's judgment in this action and remanded it to that court. (App. A.) The City timely pursued this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Has Divided the U.S. Courts of Appeals and Other Courts.

1. Four Circuits Have Held Section 14501(c) Pre-empts Cities from Enacting Safety Regulations for Tow Truck Operations.

Four circuit courts have found that Section 14501(c) pre-empts cities from promulgating safety regulations like the one involved in this case. The Eleventh Circuit was the first to address the question. *See R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). In that case, several tow truck companies contested Atlanta's ordinances governing "consensual tows," which are tows "which occur when the owner of the vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541. After determining that the pre-emption provision in Section 14501(c)(1) applied to the ordinances, the court contemplated whether the safety exception in Section 14501(c)(2)(A) rescued them from pre-emption. To determine Congress' intent, it compared the text of Section 14501(c)(2)(A), which provides that the pre-emption provision "shall not restrict the safety regulatory authority of *a State*" with the language in Section 14501(c)(2)(C), which declares that the pre-emption provision "does not apply to the authority of *a State or a political subdivision of a State*" to enforce a law relating to the price of a nonconsensual tow. 49 U.S.C. § 14501(c)(2) (emphasis added).

For four reasons, the court rejected Atlanta's argument that Section 14501(c)(2)(C) allowed it to enact safety regulations when the State of Georgia expressly had delegated its regulatory authority to its cities. First, the court relied on "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Mayer*, 153 F.3d at 545. Second, the court found that its interpretation was consistent with the ICC Termination Act's goal of increasing competition by eliminating burdensome state and local laws. *Id.* at 546. Third, the court did not believe that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), required it to interpret "State" to include a State's political subdivisions in all circumstances because the provision at issue in *Mortier* did not refer to political subdivisions at all. *Mayer*, 153 F.3d at 546-47. Fourth, the court did not believe that its holding that Section 14501(c) pre-empted municipal safety ordinances created an irreconcilable conflict with the pre-emption provisions in 49 U.S.C. §§ 5101-5127, the Hazardous Materials Transportation Authorization Act of 1994 ("HMTA Act"). *Id.* at 547-48.

Almost two years after *Mayer*, the Ninth Circuit held that Section 14501(c) pre-empts cities from promulgating safety regulations. *See Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001). In that case, Santa Ana's tow truck ordinance required permits, regulated operations, and authorized the police to establish a rotational list of companies that provide towing services for vehicle impoundment. *Id.* at 1043. A tow truck operator sued, alleging Section 14501(c) pre-empted the ordinance. Santa Ana responded that the State of California had enacted a statute expressly delegating its authority to regulate to its municipalities. The court disagreed, holding that Section 14501(c) pre-empted Santa Ana's ordinance on three grounds. First, the court relied on the presumption that Congress' omission of the "political subdivision" language in Section 14501(c)(2)(A) indicated its

intent that political subdivisions not enact safety regulations for tow trucks. *Id.* at 1051. Second, the court found that this reading of Section 14501(c) furthered the Act's goal of deregulation. *Id.* Third, the court declared that a contrary reading of that section would "lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Id.* The court went on to find, however, that Santa Ana's rotational list was saved from pre-emption by the municipal-proprietor exception. *Id.* at 1048-50.[3]

The Sixth Circuit has twice concluded that the 49 U.S.C. § 14501(c) pre-empts cities from promulgating safety regulations. *See Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Ours Garage*, 257 F.3d 506. In *Petrey*, Toledo had a two-tier licensing system: a Class A license, which permitted an operator to conduct nonconsensual tows ordered by the police, and a Class B license, which allowed an operator to conduct private and third-party tows. The court upheld the Class A licensing scheme, ruling that it was saved from pre-emption by the municipal-proprietor exception. *Id.* at 559. Giving three justifications, the court found that Section 14501(c) pre-empted the Class B licensing system and struck it down. Like the Eleventh and Ninth Circuits, the court depended on the presumption that the omission of the "political subdivision"

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3. Since *Tocher*, the Ninth Circuit has confronted this issue twice. In the first case, the U.S. District Court for the Northern District of California held three months before the Circuit issued its opinion in *Tocher* that Section 14501(c) did *not* pre-empt San Jose's safety regulations for tow trucks because those regulations were authorized by state law. *See Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000), *aff'd*, No. 00-15926, 2001 WL 1458017 (9th Cir. Nov. 16, 2001) (unpublished). Notwithstanding *Tocher*, the Circuit affirmed *Hott* because the plaintiff had litigated the pre-emption claim in state court and obtained a final judgment on the merits. *Id.* In the second case, the Ninth Circuit applied *Tocher* and reversed the district court. *Syldyld, Inc. v. City of San Jose*, No. 00-15953, 2001 WL 1459523 (9th Cir. Nov. 16, 2001) (unpublished).

language indicated Congress' intent that cities not enact safety regulations for tow trucks. *Id.* at 561. The court similarly found that *Mortier* was inapplicable because the law at issue in that case contained many differences from Section 14501(c). *Petrey*, 246 F.3d at 561-62. In addition, the court believed that the legislative history of the ICC Termination Act indicated that Congress' intent was to promote greater competition in the motor carrier industry by eliminating state economic regulation. *Id.* at 563.

Two months after issuing its opinion in *Petrey*, the Sixth Circuit decided *Ours Garage*. There, it relied completely on *Petrey* when affirming the district court's judgment, which permanently enjoined Columbus from enforcing its ordinance governing consensual towing. *Ours Garage*, 257 F.3d at 507.

The Fifth Circuit is the most recent circuit to have examined the pre-emption issue. In *Stucky*, towing company owners sued the city, challenging ordinances that prohibited tow trucks from removing disabled vehicles from public streets unless ordered to do so by the city, and that awarded all the city's towing business to one company. The court first determined that the ordinances, by prohibiting a company from towing a vehicle with its owner's consent unless the City also ordered it, were not saved from pre-emption by the municipal-proprietor exception because the city's actions were "regulatory in nature." 260 F.3d at 438. For four reasons, the court then rejected San Antonio's contention that the State's delegation of its regulatory power to municipalities allowed the city to enforce safety-related requirements for tow trucks. *Id.* at 443-46. First, the court relied on the presumption that the omission of the "political subdivision" language indicated Congress' intent. *Id.* at 440-41. Furthermore, the court concluded that the statute in *Mortier* was "quite different" from Section 14501(c). The court also found that a contrary reading of Section 14501 would mean that Congress could never pre-empt local regulations while leaving intact a State's ability to regulate, which would lead to "an absurd result." *Stucky*, 260 F.3d at 443.

Fourth, the court determined that the legislative history behind the enactment of Section 14501(c) showed that Congress' purpose was to increase competition by eliminating local regulations. *Id.* at 444-46.

2. One Circuit and One State Appellate Court Have Held Section 14501(c) Does Not Pre-empt Cities from Enacting Safety Regulations for Tow Truck Operations.

Two appellate courts have found that Section 14501(c) does not pre-empt cities from enforcing safety regulations for tow trucks. The first court to do so was the Second Circuit, which held in 1999 that the section does not pre-empt such regulations. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999). The court based its decision on five grounds. Like the other four circuits, the court first recognized that the safety exemption did not specifically include political subdivisions. However, it decided that this was "no reason to construe" Section 14501(c)(2)(A) "to prevent the state from delegating *its* regulatory authority to a municipality." *Id.* at 775 (emphasis in original). In this case, the State of New York had delegated its regulatory authority to the City of New York. *Id.* at 776. Second, the court believed that the legislative history for the FAA Authorization Act indicated that state safety regulatory authority was to be "unaffected" by the pre-emption provision. *Id.* at 775. Third, the court concluded that the legislative history connected with Section 14501(c) suggest that its main purpose was to eliminate local economic regulation, not safety regulation. *Id.* at 776. Furthermore, the court relied on the presumption against pre-emption of States' regulations enacted under their police powers. *Id.* Fifth, the court deferred to the expertise of the U.S. Department of Transportation, which believes that Section 14501(c)(2)(A) exempts state and local safety regulations from pre-emption. *Id.*

Almost two years after *Ace*, the Court of Appeals for the First District of California followed it in ruling that Section 14501(c) does not pre-empt municipal safety regulation of tow

trucks. *See Servantes*, 103 Cal. Rptr. 2d 870. In that case, the City of San Francisco sued a towing company, asserting a claim for unfair business practices and seeking a permanent injunction, civil penalties, and a disgorgement of profits. After entering a preliminary injunction while the case was pending, the trial court entered judgment permanently enjoining the towing company from towing vehicles from private property and ordered the company to pay a civil penalty, to disgorge illegal profits, and to pay a fine for violating the preliminary injunction. The company appealed, arguing that Section 14501(c) pre-empted the city's ordinance. The court affirmed, justifying its decision on the pre-emption issue on three grounds. The court first based its ruling on the presumption against pre-emption of a state's regulations enacted under its police powers. *Id.* at 879-80. It then turned to the legislative history behind the FAA Authorization Act, and found no evidence of a Congressional desire to pre-empt local control over safety issues. *Id.* at 880. Third, the court concluded that Congress could have expressly declared that municipal regulation of safety issues was pre-empted, but failed to do so. *Id.*

3. Summary.

The split in the lower courts on this issue has ripened to the point where this Court must resolve it. This Court's primary charge, which is inscribed above the front doors of its building, is to ensure "equal justice under law." Equal justice under the law is being denied, however, when the validity of a safety-related towing ordinance depends on the location of the municipality enacting it rather than on its content. Furthermore, the validity of such an ordinance in California turns on whether the municipality is sued in state or federal court. This Court must remedy this intolerable situation.

B. The Question Presented Is Important and Recurring.

In addition to bringing a question that involves a mature division among the circuit courts, this petition concerns a significant and persistent issue to municipalities throughout the United States. Besides the six appellate courts listed in the

previous section of this petition and the lower courts involved in those cases and in this case, the City is aware of seven other courts that have confronted this pre-emption issue. *See Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801 (S.D. Tex. 2000); *Hott*, 92 F. Supp. 2d 996; *New Orleans Towing Ass'n v. City of New Orleans*, No. Civ. A. 99-3131, 2000 WL 193071 (E.D. La. Feb. 15, 2000); *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*, 78 F. Supp. 2d 725 (E.D. Tenn. 1999); *A. J.'s Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 WL 185521 (N.D. Tex. April 15, 1998); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996); *City of Cleveland v. Fox*, 761 N.E.2d 126 (Ohio Ct. App. 2001); *cf. Martin v. Stites*, 4 Fed. App. 621, 633, 2001 WL 121855, at *10-11 (10th Cir. Feb. 13, 2001) (unpublished) (Briscoe, C.J., concurring and dissenting) (urging remand to consider whether permit policy is saved by the safety exception), *cert. denied*, 122 S. Ct. 64 (2001).

Furthermore, the City knows of three courts that have considered whether Section 14501(c) pre-empts political subdivisions from enacting safety regulations regarding other commercial vehicles. *See California Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298 (E.D. Cal. 2001) (holding Section 14501(c) pre-empts state law authorizing municipal safety regulation of motor carriers); *Southern Blasting Servs., Inc. v. Wilkes County*, 162 F. Supp. 2d 455, 464-65 (W.D.N.C. 2001) (holding Section 14501(c) pre-empts state fire code authorizing county fire marshal to issue directive restricting vehicles transporting explosive materials); *City of Columbus v. Garrett*, No. 00AP-610, 2001 WL 289980 (Ohio Ct. App. March 27, 2001) (unpublished) (holding Section 14501(c) pre-empts municipal safety regulation of overweight and oversized vehicles), *appeal allowed*, 754 N.E.2d 262 (Ohio 2001), *dismissed*, 758 N.E.2d 182 (Ohio 2001).

The City likewise is aware of four decisions that have examined the scope of the safety exemption in Section 14501(c)

in other contexts. *See Pedus Sec. Servs. v. Con-Way W. Express, Inc.*, Nos. A092479, A093984, 2001 WL 1660036 (Cal. App. Dec. 28, 2001) (unpublished) (holding Section 14501(c) pre-empts common-law equitable indemnity action against motor carrier); *Espada v. Vehicle Removal Corp.*, No. 05-99-02140-CV, 2001 WL 996062 (Tex. App. – Dallas Aug. 31, 2001, pet. requested) (unpublished) (following *Whitten*); *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293 (Tex. App. – Dallas 2001, pet. requested) (holding Section 14501(c) pre-empts state towing statute authorizing private action for damages against towing company); *Horn v. A. J.'s Wrecker Serv., Inc.*, No. 05-99-01402-CV, 2000 WL 1184597 (Tex. App. – Dallas Aug. 22, 2000, no pet.) (unpublished) (holding Section 14501(c) pre-empts common-law negligence action and state deceptive trade practices statute authorizing private action for damages against towing company).

Additionally, to the best of the City's knowledge, many other municipalities have safety-related ordinances governing tow trucks. This is corroborated by the fact that three parties, including the International Municipal Lawyers Association, have filed amicus briefs in support of the *Ours Garage* petition. *See* Ct.'s Docket No. 01-419.

C. The Fifth Circuit Has Decided this Important Federal Question in a Way that Clearly Misapplies or Conflicts with Relevant Decisions of this Court.

1. The Fifth Circuit's Decision Clearly Misapplies *Medtronic*.

a. The Framework of Pre-emption Analysis.

The Supremacy Clause of the United States Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state laws are pre-empted where they conflict with a federal law, and they must yield to that law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

Federal law pre-empts state law under the Supremacy Clause when: (1) Congress defines explicitly the extent to which a federal statute pre-empts state law ("express preemption"); (2) the state law directly conflicts with the force or purpose of federal law ("conflict preemption"); or (3) the federal law occupies a legislative field to such an extent that it is reasonable to infer that Congress left no room for state regulation in that field ("field preemption"). *Cipollone*, 505 U.S. at 516. Although a municipal ordinance is at issue in this case rather than a state law, the constitutionality of a municipal ordinance for purposes of the Supremacy Clause is "analyzed in the same way as that of statewide laws." *Mortier*, 501 U.S. at 605.

Pre-emption " 'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (*quoting FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990)). On the other hand, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

Where a federal statute expressly pre-empts state or local law, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996) (citations omitted). The interpretation of the text is guided by two presumptions about the nature of pre-emption. First, a court should " 'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *Id.* at 485 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). This presumption is especially strong in areas such as health and safety measures. *English*, 496 U.S. at 79. This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

The second presumption is that Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Id.* (*quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Cipollone*, 505 U.S. at 516. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S at 485 (citation omitted). The "structure and purpose of the statute as a whole" may also be considered. *Id.* In addition, even with a clear expression of intent to pre-empt state and local regulation, a court must still determine the scope of pre-emption. *Id.*

b. The Fifth Circuit's Decision Clearly Misapplies Both *Medtronic* Presumptions.

i. Congress' Purpose When Enacting the Safety Exemption Was to Leave State Safety Authority Unaffected.

When Congress enacted the FAA Authorization Act, it contained both the pre-emption provision relied upon by Cole and the safety exemption relied upon by the City. *See* Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606 (1994). The legislative history of that Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulation, not local safety regulations:

> [P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

See H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 87, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (emphasis

added). Specifically, the legislative history indicates that Congress' purpose was to free the motor carrier industry from state and local economic regulation and to put that industry on a playing field level with that of the air carrier industry, which Congress had already deregulated by passing the Airline Deregulation Act of 1978. *See* H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. at 85, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1759. In so doing, Congress intended to eliminate the competitive advantage air carriers, like Federal Express, had enjoyed under decisions interpreting the 1978 statute, relative to motor carriers, such as United Parcel Service. *Id.*

By contrast, the conference report does not say that *state safety regulation* of motor carriers causes any problems even though it presumably is just as "diverse" as state economic regulation. In fact, there is no evidence or congressional findings that municipal safety regulations would interfere with Congress' concern for competitiveness in tow trucking. The legislative history of this Act indeed indicates that state safety regulatory authority (presumably including the authority to delegate) was to be "unaffected" by the pre-emption provision. *See* H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 43, 84, 85, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1757 ("State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected."); *see also id.* at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756 ("[N]othing in these new subsections contains a new grant of Federal authority to a State. . . . The intention of the conferees is solely to identify certain areas that are not preempted.").

ii. Congress' Intent When Enacting the Nonconsensual Rate Exemption Is Not Relevant When Determining Its Intent on the Safety Exemption.

One year after passing the FAA Authorization Act, Congress enacted the ICC Termination Act. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). This statute recodified the pre-emption

provision in its current form as a part of the ICA. This statute also added an exception to pre-emption that authorized States and political subdivisions to enforce laws relating to the price of a nonconsensual tow. *See* 109 Stat. at 899. The House report for the ICC Termination Act noted that the added exception to the pre-emption provision "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." *See* H.R. Rep. No. 311, 104th Cong., 1st Sess. 1, 120, *reprinted in* 1995 U.S.C.C.A.N. 793, 832. Accordingly, the provision was "not intended to permit re-regulation of any other aspect of tow truck operations." *Id.* at 119, *reprinted in* 1995 U.S.C.C.A.N. at 831.

The Fifth, Sixth, Ninth, and Eleventh Circuits relied on the comments of an individual legislator before the passage of the ICC Termination Act in 1995 and the Act's conference report as evidence that Congress intended that Act to prohibit cities from regulating tow trucks except for the rates for nonconsensual tows. *See Stucky*, 260 F.2d at 444 n.24 (statement of Rep. Rahall); *Petrey*, 246 F.3d at 563 (conference report); *Mayer*, 158 F.3d at 544-45 (conference report and statement of Rep. Rahall); *Toucher*, 219 F.3d at 1051 (relying on *Mayer*). The conference report and the comments are inapposite for at least two reasons. First, the conference report and the comments do not address the safety exception at issue in this case; instead, they were made in connection with the enactment of the "nonconsensual rate" exception to the pre-emption provision in the ICC Termination Act. Second, even if the comments were somehow applicable, they are post-enactment to the exception at issue here. Post-enactment statements are entitled to little weight. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967). The same is true for a post-enactment conference report because "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 89 (1996).

iii. Regulation of Tow Trucks Falls within the Historic Police Powers of the States.

The issue in this case implicates an important federalism concern.[4] When analyzing the scope of a federal pre-emption provision, this Court for years has recognized that the analysis starts with the assumption that the statute does not supersede the "historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485.

The Court has defined the police power "as the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). For years, courts have known that States and their cities may exercise their police power by regulating tow trucks to prevent traffic congestion and dangers incident thereto. *See, e.g., Librizzi v. Plunkett*, 16 A.2d 280, 281-82 (N.J. 1940); *Hempstead T–W. Corp. v. Town of Hempstead*, 177 N.Y.S.2d 445, 451-52 (N.Y. Sup. Ct. 1958), *aff'd*, 179 N.Y.S.2d 848 (N.Y. App. Div. 1958); *City of Chattanooga v. Fanberg*, 265 S.W.2d 15, 19-20 (Tenn. 1954); *City of Dallas v. Harris*, 157 S.W.2d 710, 711-12 (Tex. Civ. App. – Dallas 1941, writ ref'd); *cf. Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993) (noting "municipal regulation of the business of towing is not

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4. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 1041, 144, 162-66 (1992) (*citing Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)); *see also Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers").

unusual"). In *Fanberg*, the court specifically noted that States often delegate their power to regulate tow trucks to their cities:

> It seems to us clear under many authorities that the business of carrying or transporting property for hire is a privilege, the licensing, regulation and control of which is a legislative prerogative. This power to regulate the roads and streets is likewise a legislative prerogative and may be delegated by the Legislature of the State to the cities who in turn may by ordinance regulate control of the use and operation of wreckers or towing cars on its streets.

Id. at 19.

For decades, this Court also has recognized that States may regulate businesses that use streets:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

Stephenson v. Binford, 287 U.S. 251, 256 (1932). In fact, "[I]n no field has [this Court's] deference to state regulation been greater than that of highway safety regulation." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

Furthermore, this Court has known that States have traditionally re-delegated their regulatory authority to their cities. *Mortier*, 501 U.S. at 607-09. In this case, the Texas Legislature has expressly delegated its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a) (Vernon Supp. 2002). In turn, the City enacted the regulation at issue.[5]

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5. Cole has questioned whether Section 48A-13(a)(7)(A)(xiii) is a safety regulation. In *Ace*, tow truck companies challenged New York City's specific requirements regarding licensing, display of information, (Cont'd)

This Court has consistently regarded state regulations concerning public safety on streets and highways as innately local in nature and presumptively valid. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court's deference to the historic police power of the States and their cities is not only mandated by the Constitution, but also should result in the best protection of the public:

> The City Fathers of Chattanooga who enacted the Ordinance are presumed to be familiar with the local

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(Cont'd)

reporting, recordkeeping, criminal history, insurance, posting of bond, and maintenance of storage and repair facilities. The court found that "Most of these requirements are so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis is necessary to conclude that they fall within the 14501(c)(2)(A) exemptions." *Ace*, 171 F.2d at 776.

Similarly, the tow truck company in *Servantes* challenged San Francisco's specific requirements regarding licensing, reporting, and recordkeeping. The court held:

> [T]he San Francisco ordinances establishing licensing, reporting, recordkeeping, and other requirements for towing businesses are directly related to safety concerns and fall within the safety regulation exception. The permit scheme of the San Francisco Police Code serves to ensure that only qualified persons undertake nonconsensual tows. *The permit application process allows the police to check the background of permit applicants and to reject unsuitable persons, e.g., those with a history of vehicle offenses.*

Servantes, 103 Cal. Rptr. 2d at 880 (emphasis added).

Here, U.S. District Judge Fitzwater has previously found that Chapter 48A of the Dallas City Code was designed to address safety issues. *AJ's Wrecker*, 1998 WL 185521, at *3. When confronted by the same issue, Judge Lynn agreed with Judge Fitzwater. (App. D at 10a-11a.) It is reasonable to conclude that a person who has been confined for a drug offense may pose a risk to the public if he is behind the wheel of a tow truck because of the possibility that he may still be using or addicted to illegal drugs. A law should be upheld if any facts either known or reasonably assumed will support it. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). Furthermore, there is no evidence in the record that the requirement at issue is irrational.

> conditions and the necessity for the regulation of wreckers and towing cars. These legislative and administrative officials of the city are the ones who receive complaints about such things and they are the ones who are in a position to know what should be done to protect the public safety.

Fanberg, 265 S.W.2d at 20; *see also The Federalist* No. 17, at 107 (Alexander Hamilton) (J. Cooke ed. 1961); *The Federalist* No. 46, at 316 (James Madison) (J. Cooke ed. 1961).

Here, Congress did not prescribe how States were to assert their authority when it enacted the FAA Authorization Act. Congress knew, or should have known, however, that virtually all States delegate considerable police powers to their cities, including responsibility for the public's safety on streets and thoroughfares. Nonetheless, Congress, when promulgating the Act, did not explicitly prohibit cities from regulating the public-safety aspects of tow trucks.

Several state legislatures have examined Section 14501 and concluded that they may lawfully delegate their regulatory authority over tow trucks to some or all of their municipalities. *See, e.g.*, Cal. Veh. Code §§ 21100(g), 22850.5 (West 2001) (delegating State of California's regulatory authority over licensing and regulating the operation of tow truck service and tow truck drivers to its municipalities); La. Rev. Stat. § 32:1714(2) (West 2000) (delegating State of Louisiana's regulatory authority to its municipalities with a population of 450,000 or more); N.Y. Veh. & Traf. Law § 1642(a)(15) (McKinney 1996) (delegating New York State's regulatory authority to its municipalities with a population of more than one million); Tex. Transp. Code Ann. § 643.201(a) (delegating State of Texas' regulatory authority to its municipalities).

It practically goes without saying that one of the "first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state . . . law." *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (citation omitted). In this case, the Fifth Circuit did not presume that the

Texas statute delegating regulatory authority to cities was constitutional. Instead, the new pre-emption presumption proposed by the *Mayer*, *Tocher*, *Petrey*, and *Stucky* courts turns the *Medtronic* presumption on its head and would represent a significant intrusion into States' abilities to handle matters entrusted to them by Congress.[6]

iv. Summary.

As stated above, Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Medtronic*, 518 U.S. at 485. Here, the legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulation, not local safety regulations. Moreover, the legislative history of the ICC Termination Act is entitled to little, if any, weight *when interpreting the FAA Authorization Act*.

To the extent that the scope of Congress' purpose may be unclear, this Court should not construe the text of Section 14501 so as to frustrate unnecessarily the ability of cities to respond to the safety concerns created by local towing companies. Such deference to local responsibility and expertise would be consistent with the presumption against pre-emption of state and local regulations. *Id.*

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6. Courts have taken notice of the "great advantage" tow companies have over the owners of towed cars. *Servantes*, 103 Cal. Rptr. 2d at 872 (citing *Porter v. City of Atlanta*, 384 S.E.2d 631, 634 (Ga. 1989)). This advantage can lead to widespread abuses of the public. *Servantes*, 103 Cal. Rptr. 2d at 872-73, 878, 879.

Recognizing the dangers that these abuses may present to public safety as well as inherent dangers presented by tow trucks, the State of Texas has left much of the field of tow truck regulation to its municipalities, presumably believing that it could lawfully do so. If this Court were to hold that States cannot delegate such authority, then it would hamper them in their efforts to protect public safety. This is not sound public policy. *See Ace*, 171 F.2d at 776 (finding its holding consistent with public policy).

2. The Fifth Circuit's Decision Clearly Conflicts with *Mortier*.

On its face, Section 14501(c)(2)(A) excepts only "State" regulatory authority concerning safety and insurance.[7] "The term 'State' means the 50 States of the United States and the District of Columbia" for purposes of this statute. 49 U.S.C. § 13102(18). By contrast, Section 14501(c)(2)(C) allows a State and its political subdivisions to regulate the prices of nonconsensual tows.

Although Subsection (c)(2)(A) expressly refers only to "State" regulatory authority, that does not mean that this subsection does not also allow municipal regulation. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), although explicitly permitting only "a State" to regulate pesticides subject to certain federal restrictions, and defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa," does not limit a State's power to redelegate its authority to a political subdivision. *Mortier*, 501 U.S. at 607-09, 611-12.

The statute at issue in *Mortier* provided:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v. Nonetheless, this Court found the language of Sections 136(aa) and 136v to be "wholly inadequate to convey an express preemptive intent." *Mortier*, 501 U.S. at 607. "Mere silence" would not "suffice to establish 'a clear and manifest

7. Even though Congress failed to mention municipal safety regulation in this section, it did not explicitly pre-empt municipal safety regulation. Had Congress intended not to except municipal safety regulations, Congress could have said so.

purpose' to pre-empt local authority." *Id.* (citation omitted); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (pre-emption of regulation enacted pursuant to police power will not occur "in the absence of an unambiguous congressional mandate to that effect"). The Court also observed that it is well established that units of local government are created to exercise such powers as a State may entrust to them in its absolute discretion. *Mortier*, 501 U.S. at 607-08. Consequently, "the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because *political subdivisions are components of the very entity the statute empowers*."[8] *Id.* at 608 (emphasis added). In other

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8. The City is an integral component of the State of Texas. Municipal ordinances *are* state law and are prosecuted "In the name and by the authority of the State of Texas." Tex. Code Crim. Proc. Ann. art. 45.019 (Vernon Supp. 2002); *see also* Tex. Code Crim. Proc. Ann. art. 45.201 (Vernon Supp. 2002) (authorizing city attorney to represent the State in prosecutions in municipal courts). Moreover, under the Texas Constitution, the City is a home-rule municipality. *See* Special Act of April 13, 1907, 30th Leg., 1st C.S., ch. 71, 1907 Tex. Spec. Laws 568; Tex. Const. art. XI, § 5; *see also Dallas Merchants & Concessionaires Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). The Texas Local Government Code provides that a home-rule municipality has the full power of local self-government. Tex. Loc. Gov't Code Ann. § 51.072 (Vernon 1999). Accordingly, "[h]ome-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchants*, 852 S.W.2d at 490-91.

"Cities occupy an important place in our system of government. In many instances they have been created as arms of the State government, with authority to help protect and maintain the general welfare of the public." *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 288 (Tex. 1950). When a home-rule city conducts a governmental activity or function, it is operating as an arm or agent of the State. *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949).

In this case, the regulation of tow trucks is beyond doubt a governmental function. The Texas Legislature has expressly delegated

(Cont'd)

words, the term "State" is not "self-limiting." *Mortier*, 501 U.S. at 612. To the contrary, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the '*absolute discretion*' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608 (emphasis added). Thus, the express delegation of regulatory authority to a State may well mean that it is permitted to redelegate its authority to a "political subdivision[ ] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Id.* at 612.[9]

(Cont'd)

its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a). Furthermore, the Texas Tort Claims Act recognizes "regulation of traffic" and "parking facilities" as governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(11), (25) (Vernon Supp. 2002); *see also Town of Ascarate v. Villalobos*, 213 S.W.2d 945, 950 (Tex. 1949) ("A municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public, and in the exercise of its police power to protect the public from traffic hazards").

9. Since 1991, several lower courts have applied *Mortier* to hold that federal statutes allowing a "State" to regulate also authorize its political subdivisions to do so. *See Fireman's Fund Ins. Co. v. Lodi*, 271 F.3d 911, 932-36 (9th Cir. 2001) (holding that the term "State" in pre-emption provisions in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, do not prohibit municipalities from enacting hazardous waste regulations); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (holding that pre-emption provision of Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*, does not prohibit States from re-delegating their powers under the Act); *Coparr, Ltd. v. City of Boulder*, 942 F.2d 724, 726 (10th Cir. 1991) (holding that FIFRA does not prohibit States from authorizing municipalities to impose notification requirements concerning pesticide use on private individuals, property owners, and the general

(Cont'd)

Other regulatory exceptions listed in Subsection (c)(2)(A) confirm the conclusion that Congress' use of the term "a State" is not limiting. For example, the exception allowing "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo" refers to the HMTA Act. *See* 49 U.S.C. §§ 5101-5127. The HMTA Act's structure clearly allows a municipality to exercise authority over the routing of hazardous materials shipments by a motor carrier if it complies with the standards prescribed by the Act and the Secretary of Transportation. *See* 49 U.S.C. §§ 5112, 5125; *see also Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112-13 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986);

(Cont'd)

public); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) (holding that Telecommunications Act of 1996 does not prohibit States from re-delegating their powers under the Act); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939-40 (W.D. Tex. 1997) (citing *Mortier* for proposition that "State's authority to regulate under a federal statute necessarily includes the authority to delegate local regulation, including regulation for public health, safety, and welfare purposes, to local authorities"); *cf. Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that the term "State" in pre-emption provision of Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, does not prohibit cities from enacting laws to protect public from asbestos removal); *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159-60 (Cal. 1984) (holding FIFRA does not preclude States from authorizing local governments to enact restrictive pesticide regulations); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 200-01 (N.Y. Sup. Ct. 1994) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program, 10 U.S.C. §§ 4307-4311, *repealed by* Defense Authorization Act of 1996, P.L. 104-106, § 1624, 110 Stat. 186, 522 (1996), did not pre-empt city ordinance which restricted possession of automatic and semiautomatic weapons); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program did not pre-empt city ordinance prohibiting possession and sale of "assault weapons").

City of New York v. United States Dep't of Transp., 715 F.2d 732 (2d Cir. 1983), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984); *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

Notwithstanding this weight of authority, the Fifth, Sixth, and Eleventh Circuits all explicitly refused to apply *Mortier* to this case. *Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47.

D. The Second Circuit's Decision Does Not Conflict with *BFP* and *Russello*.

In response to the clear command of *Mortier*, the Fifth Circuit as well as the Sixth, Ninth and Eleventh Circuits followed "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Stucky*, 260 F.3d at 440-41 (relying on *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Petrey*, 246 F.3d at 561 (relying on *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) and *Russello*); *Toucher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 545 (relying on *BFP* and *Russello*). This is simply another way of stating the maxim "*expressio unius est exclusio alterius*," which means "the expression of one thing is the exclusion of another."

This maxim should not be applied when analyzing the FAA Authorization Act for several reasons. First, *Russello* itself counsels that this presumption has force only if the two provisions in question are included within the same legislative enactment: " '[W]here Congress includes particular language in one section of a statute but omits it in *another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello*, 464 U.S. At 23 (citation omitted; brackets original; emphasis added). Here, the two exceptions to pre-emption were passed in two different Acts.

Second, this maxim should not applied to exclude agents of an enumerated party. Seven years before *Mortier*, the

California Supreme Court examined whether FIFRA, a statute that authorized "State" regulation of pesticides, precluded States from authorizing local governments to enact such regulations. *See County of Mendocino*, 683 P.2d 1150. Some plaintiffs relied upon this maxim, claiming that the reference to "State" should be read as excluding local governmental regulation. That court rejected the application of the maxim for two reasons:

> Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Id. at 1160.

Third, this maxim is only an aid to statutory construction and not a rule of law. *United States v. Castro*, 837 F.2d 441, 443 n.2 (11th Cir. 1988). Accordingly, the maxim should be used with care. *See Castro*, 837 F.2d at 443 n.2. In 1927, this Court quoted Lord Justice Lopes' warning about the maxim:

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Ford v. United States, 273 U.S. 593, 611-12 (1927).

On several occasions, the Supreme Court has stated that the maxim is subordinate to legislative intent or policy. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("However well these rules may serve at times to aid in deciphering legislative

intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."); *Ford*, 273 U.S. at 611; *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 15 (1904).

Here, the legislative history of the FAA Authorization Act shows that Congress' purpose was to eliminate disparate *economic* regulation, not local safety laws. Furthermore, the legislative history of the ICC Termination Act is entitled to little, if any, weight.

CONCLUSION

The petition should be granted and it should be consolidated with *Ours Garage*.

Respectfully submitted,

CHRISTOPHER D. BOWERS
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 9, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-10194
Summary Calendar

PETER T. COLE

Plaintiff-Appellant

v.

CITY OF DALLAS

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CV-1723-M

Before KING, Chief Judge, and HIGGINBOTHAM and BENAVIDES, Circuit Judges.

PER CURIAM:*

Peter T. Cole appeals the district court's denial of his civil rights complaint in which he requested injunctive and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

declaratory relief, damages, attorneys' fees, and costs. The City of Dallas (City) denied Cole's request for a wrecker driver's permit pursuant to chapter 48A-13 (a) (7) (A) (xiii), which prohibits the issuance of a wrecker driver's permit to a person who has been convicted of a crime involving a violation of the Controlled Substances Act, or a comparable state or federal law, that is punishable as a felony for which less than five years have elapsed since the date of conviction or the date of confinement for the last conviction, whichever is the later date. The district court concluded that chapter 48A of the Dallas city code, which regulates the towing services industry in Dallas, has not been preempted by 49 U.S.C. § 14501(c). Cole argues that 49 U.S.C. § 14501(c) preempts chapter 48A and that the safety exemption of § 14501 (c) (2) does not apply to municipalities.

In a supplemental letter brief filed after our decision in *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), the City of Dallas states that "[a]s [chapter] 48A-13 (a) (7) (A) (xiii) is a motor vehicle safety regulation, the City acknowledges that *Stucky* prohibits a city from enacting or enforcing such a law." The City then puts forward several arguments for the reconsideration of *Stucky*. Only the en banc court can reconsider *Stucky*. We are bound by it. The City's concession decides this case. Accordingly, the district court's judgment is VACATED, and the case is REMANDED to the district court for further consideration consistent with this opinion.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED JANUARY 11, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:00-CV-1723-M

PETER T. COLE,

Plaintiff,

v.

CITY OF DALLAS,

Defendant.

FINAL JUDGMENT

1. On August 9, 2000, the Court heard Plaintiff's application for preliminary injunction. Plaintiff, Peter T. Cole ("Cole"), appeared through his attorney and announced ready and made argument. Defendant, City of Dallas, appeared through its attorney and announced ready and made argument. The Court determined that it had jurisdiction over the subject matter and the parties to this proceeding.

2. There was no right to a jury trial on the issues before the Court.

Appendix B

3. The Court heard the evidence and arguments of counsel.

4. The Court made written findings of fact and conclusions of law in its Memorandum Opinion and Order, dated August 23, 2000.

5. The parties entered into stipulations of fact, filed on January 9, 2001.

Findings of Fact

6. The Court makes the following findings of fact:

   a. Dallas City Code Chapter 48A requires a tow truck driver to obtain a special driver's permit issued by the City of Dallas ("a wrecker driver's permit").

   b. Plaintiff was denied such a permit when he requested it from the City of Dallas, solely because the Dallas City Code prohibits issuance of a wrecker driver's permit to a person convicted of an offense related to a delivery of a controlled substance who was recently released from prison, as was Plaintiff.

   c. Dallas City Code Chapter 48A relates to price, route and/or service of towing companies.

   d. Dallas City Code Chapter 48A is a law enacted to protect the public interest.

e. Dallas City Code Chapter 48A is a law which the City of Dallas administers in a manner that protects the public health and safety and promotes public convenience and necessity.

Conclusions of Law

7. The Court makes the following conclusions of law:

a. Dallas City Code 48A relates to price, route and/or service.

b. Dallas City Code 48A is a regulation to protect the public health and safety.

c. Dallas City Code 48A is a motor vehicle safety regulation and is not preempted by 49 U.S.C. § 14501(c).

d. State regulation of motor vehicle safety is expressly exempted from preemption by 49 U.S.C. § 14501(c)(2)(A).

e. The State of Texas is permitted by 49 U.S.C. § 14501(c) to delegate its regulatory authority under 49 U.S.C. § 14501(c) to a political subdivision of the State.

f. By virtue of the State's redelegation to the City of Dallas ("the City"), the City is permitted by 49 U.S.C. § 14501(c)(2)(A) to regulate motor vehicle safety.

g. The City's determination under Dallas City Code Chapter 48A of whether to issue a wrecker driver's permit in consideration of the applicant's criminal history under § 48A is a regulation regulating motor vehicle safety.

8. Based on these findings of fact and conclusions of law, the Court orders that Plaintiff, Peter T. Cole, take nothing by his suit.

9. The Court denies all relief not granted in this judgment.

10. This is a FINAL JUDGMENT.

SO ORDERED.
January 11, 2001.

s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED AUGUST 23, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:00-CV-1723-M

PETER T. COLE,

Plaintiff,

v.

CITY OF DALLAS,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Peter T. Cole ("Cole") sues Defendant, the City of Dallas ("the City"), for declaratory and injunctive relief with respect to certain towing regulations. Cole sought a Temporary Restraining Order ("TRO") and a preliminary injunction to prevent the City from enforcing Chapter 48A of the Dallas City Code, which regulates the service, routes, and pricing of towing companies operating within the City. Prior to removal, the state court granted a TRO, which lapsed on its own terms. Plaintiff's application for a preliminary injunction is currently before the Court, and oral argument was heard on August 9, 2000.

Appendix C

Having considered the record and the applicable law, for the reasons stated below, the Court holds that Plaintiff fails to demonstrate a substantial likelihood of success on the merits, and denies the preliminary injunction.

I. Analysis and Decision

To obtain a preliminary injunction, Plaintiff must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury outweighs any damage the injunction might cause to the defendant; and (4) that the injunction does not disserve the public interest. *Canal Auth. of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). The burden of establishing these four requirements is a heavy one because the granting of such a remedy constitutes extraordinary relief. *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

Plaintiff challenges the enforcement of Chapter 48A of the Dallas City Code, claiming it violates the Interstate Commerce Act, 49 U.S.C. § 14501(c).[1] Specifically, Chapter

1. Section 14501(c)(1) expressly prohibits a state or a political subdivision thereof from "enact[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1) (1997).

48A-12 requires the issuance by the City of a special driver's permit when the driver is to provide towing services within the City. Plaintiff, who was denied such a permit, argues that Chapter 48A is preempted by § 14501(c), and asks for injunctive relief, claiming he has lost the opportunity to make a living as a tow truck driver within the City.

It is clear that, on its face, Chapter 48A is preempted by § 14501(c), since it relates to price, route and/or service of a motor carrier. However, a statutory exception to § 14501(c) preemption is prescribed under § 14501(c)(2)(A), for the "safety regulatory authority of a State with respect to motor vehicles." In other words, regulations related to motor vehicle safety are expressly exempted from preemption by 49 U.S.C. § 14501(c)(2)(A)[2] *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 991 F. Supp. 573, 576 (N.D. Tex. 1998), *affirmed* 180 F.3d 686 (5th Cir. 1999). However, Plaintiff argues that such exception applies only to regulations promulgated by the State of Texas, not by the City of Dallas. The Court disagrees with this interpretation.

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2. Specifically, § 14501(c)(2) states that Paragraph 1 (preemption):

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls, or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self insurance authorization.

Appendix C

The State of Texas is permitted to redelegate its authority to a "political subdivision[] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 (1991). *See also AJ's Wrecker Service, Inc. v. City of Dallas*, 1998 WL 185521, *3 (N.D. Tex. Apr. 15, 1998) (holding that State could redelegate its authority to the City of Dallas to enact safety regulations). Here, the State of Texas has enacted legislation that grants municipalities the right to "regulate the operation of a tow truck to the extent allowed by federal law." TEX. TRANSP. CODE ANN. § 643.201(a) (Vernon 1996). Therefore, Section 14501(c)(2)(A) preserves the City's authority to regulate motor safety.[3] *AJ's Wrecker* at 3.

Next Plaintiff contends that the regulations at issue do not fall with the statutory exception for "safety" regulation. Specifically, he argues that the term "safety," as used in the statute, speaks only to the safety of the motor vehicle itself. According to Cole, since Chapter 48A has nothing to do with the safety of motor vehicles, but rather regulates the drivers of such vehicles, it does not fall into the prescribed exception.

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3. Currently, there is a split between the Second and Eleventh Circuits on this precise issue. *See Ace Auto Body & Towing, Ltd. v. New York*, 171 F.3d 765, 777 (2ND Cir.), *cert. denied*, 120 S.Ct. 166 (1999) (state can delegate regulatory authority to municipality, thus shielding city's regulation from preemption); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1334 (1999) (state cannot delegate authority to city). The Fifth Circuit has not addressed whether the preemption exemption for safety regulations can be invoked by municipalities.

Appendix C

This Court concludes, as has Judge Sidney Fitzwater in a similar case in this district, that Chapter 48A is designed to address safety issues, and that it should not be so narrowly construed as Plaintiff urges. *See AJ's Wrecker* at 3. The stated policy of Chapter 48A is to protect the public interest, as it relates to private non-consensual tows, through regulations administered in a manner that protects the public health and safety and promotes public convenience and necessity. Additionally, the City ordinance that amended Chapter 48A delineates several safety concerns underlying Chapter 48A regulations.[4] As was the case in *AJ's Wrecker*, Plaintiff has failed to introduce any evidence that the City promulgated the challenged regulation for any reason other than public safety.

Because this Court concludes that Chapter 48A probably falls within the safety regulation exception of § 14501(c)(2)(A), and is thus not preempted, the Court holds that Cole has failed to demonstrate a likelihood of success

4. In passing the ordinance, the City Council noted that such regulations promote the public safety of both visitors and residents of the City by contributing to a decrease in the potential for confrontation and violence between vehicle owners and tow truck drivers; a decrease in bodily injury and property damage caused by faulty tow truck vehicles and equipment by incompetent, negligent, and criminal actions of tow truck operators and drivers; a decrease in the number of false auto theft reports processed by the police department, allowing the police to devote more time to respond to more critical public safety situations; and a decrease in auto theft incidences and an increase in the recovery of stolen autos by allowing the police to more quickly and efficiently determine when a car has been stolen, rather than towed, and take appropriate action. *See* Chapter 48A of the Dallas City Code.

on the merits of his claim. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 991 F.Supp. 573, 576 (N.D. Tex. Jan. 9, 1998) (city towing contract for emergency wrecker service and related ordinance fell within safety exception because "(t]here is no doubt that the Ordinance and Contract have a safety purpose"); *Ace Body & Towing, Ltd. v. City of New York*, 1997 WL 221261, at *3 (S.D.N.Y. Apr. 28,1997) (preliminary injunction denied since plaintiffs were not likely to succeed on the merits since it is "likely that the challenged regulations (governing emergency wrecker service] fall within the safety regulation exception of Section 14501(c)(2)(A)"); *AJ's Wrecker* at *4 (preliminary injunction denied since plaintiffs would likely not succeed on the merits because Chapter 48A of the Dallas City Code is probably a proper safety regulation and not preempted). Accordingly, Plaintiff's application for a preliminary injunction is denied.

II. Conclusion

The Court need not reach the other elements of the test for the issuance of a preliminary injunction since Plaintiff has failed to demonstrate a substantial likelihood of success on the merits. The Court denies Plaintiff's request for a preliminary injunction.

SO ORDERED.

August 23, 2000.

s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

APPENDIX D — CITY OF DALLAS ORDINANCE NO. 24175

ORDINANCE NO. 24175

An ordinance repealing and reenacting CHAPTER 48A, "VEHICLE TOW SERVICE," of the Dallas City Code, as amended; defining terms; providing regulations and requirements for a vehicle tow service; deleting a requirement that a vehicle tow service have a written agreement with each vehicle storage facility it uses; allowing vehicle tow service licensees to subcontract with each other to provide vehicle tow service in the city; requiring the director to issue or deny a vehicle tow service license within 30 days after receiving an application; deleting a requirement that a wrecker driver be examined on traffic laws and city geography; providing that an applicant for a wrecker driver's permit may receive copies of everything in his or her file to the extent allowed under the Public Information Act; extending the time in which an appeal may be filed for certain suspensions of a wrecker driver's permit; requiring that, on and after February 1, 2001, additional tow signs be posted on the interior of private property to provide towing information in Spanish and to provide information relating to tow charges and complaints; increasing the maximum fees that may be charged for vehicle tow service; providing weight and equipment requirements for wreckers; making certain semantic, grammatical, and structural changes; providing a penalty of not less than $200 nor more than $500; providing a severability clause; and providing an effective date.

WHEREAS, 49 U.S.C. § 14501(c) prohibits enforcement of state and local towing regulations relating to price, route, or service, with certain exceptions; and

Appendix D

WHEREAS, those exceptions allow a state to impose safety-related regulations and minimum insurance requirements on tow trucks and allow state and local regulation of the price of nonconsensual tows; and

WHEREAS, court decisions have held that a municipality, as a political subdivision and governmental unit of a state, may exercise any powers granted to the state that the state may wish to redelegate to its municipalities; and

WHEREAS, in Chapter 684 of the Texas Transportation Code, the State of Texas has delegated to its municipalities some of its power to regulate tow services, which powers are granted to the State of Texas by the 49 U.S.C. § 14501(c) exceptions; and

WHEREAS, the city council finds that the city of Dallas may impose safety-related regulations and minimum insurance requirements on tow trucks, in addition to regulating the price of nonconsensual tows, in the same manner as the State of Texas; and

WHEREAS, the city council finds that the proposed regulations governing persons performing nonconsensual tows from private property, which regulations include, but are not limited to, licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements, are all safety-related or otherwise fall within the 49 U.S.C. § 14501(c) exceptions; and

WHEREAS, the city council believes that the proposed safety-related regulations for nonconsensual tows would

promote the public safety of both visitors and residents of the city of Dallas by contributing to a decrease in the potential for confrontation and violence between vehicle owners and the persons who tow their vehicles; a decrease in bodily injury and property damage caused by faulty tow truck vehicles and equipment or by incompetent, negligent, and criminal actions of tow truck operators and drivers; a decrease in the number of false auto theft reports processed by the police department, thereby allowing the police to devote more time to responding to more critical public safety situations; and a decrease in auto theft incidences and an increase in the recovery of stolen autos by allowing the police to more quickly and efficiently determine when a car has been stolen, rather than towed, and take appropriate action; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That CHAPTER 48A, "VEHICLE TOW SERVICE," of the Dallas City Code, as amended, is repealed and reenacted to read as follows:

Appendix D

CHAPTER 48A

VEHICLE TOW SERVICE

ARTICLE I.

GENERAL PROVISIONS.

SEC. 48A-1. STATEMENT OF POLICY

It is the policy of the city to provide for the protection of the public interest as it relates to the parking of vehicles on private property and to the removal of those vehicles to vehicle storage facilities without the consent of the vehicle owners or operators. To this end, this chapter provides for the regulation of vehicle tow service, to be administered in a manner that protects the public health and safety and promotes the public convenience and necessity.

* * *

ARTICLE III.

WRECKER DRIVER'S PERMIT.

SEC. 48A-12. WRECKER DRIVER'S PERMIT REQUIRED.

(a) A person commits an offense if he operates a wrecker engaged in vehicle tow service in the city without a valid wrecker driver's permit issued to the person under this article.

(b) A licensee commits an offense if he employs or otherwise allows a person to operate for compensation a wrecker owned, controlled, or operated by the licensee unless the person has a valid wrecker driver's permit issued under this article.

SEC. 48A-13. QUALIFICATIONS FOR A WRECKER DRIVER'S PERMIT.

(a) To qualify for a wrecker driver's permit, an applicant must:

* * *

(7) not have been convicted of a crime:

(A) involving

* * *

(xiii) a violation of the Controlled Substances Act (Article 4476-15. Vernon's Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law;

* * *

(B) for which:

* * *

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense.

* * *

SEC 48A-16. ISSUANCE AND DENIAL OF WRECKER DRIVER'S PERMIT.

(a) The director shall issue a wrecker driver's permit to an applicant, unless the director determines that the applicant is not qualified.

* * *

(c) The director shall deny the application for a wrecker driver's permit if the applicant:

(1) is not qualified under Section 48A-13:

* * *

SECTION 2. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

* * *

Passed JAN 26 2000
LC/DCC/00189a

APPENDIX E — RELEVANT STATUTE AND CODE INVOLVED

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of a for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

* * *

TEX. TRANSP. CODE

SUBCHAPTER E. TOW TRUCKS

§ 643.201. Tow Truck Regulation by Political Subdivisions

(a) In addition to the registration requirements of Subchapter B, a political subdivision of this state may regulate the operation of a tow truck to the extent allowed by federal law.

* * *

Supreme Court U.S.
FILED
MAY 13 2002
OFFICE OF THE CLERK

No. 01-1206

IN THE

Supreme Court of the United States

THE CITY OF DALLAS,

Petitioner,

v.

PETER T. COLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES C. MOSSER
BYRON K. HENRY
MOSSER MALLERS PLLC
17110 Dallas Parkway, Suite 290
Dallas, Texas 75248
(972) 733-3223

Dated: May 13, 2002

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED RESTATED

The question presented is better restated as:

Does the exception at 49 U.S.C. § 14501(c)(2)(A) preserving the "safety regulatory authority of a State with respect to motor vehicles" allow political subdivisions to regulate the operations of motor carriers of property.

LIST OF PARTIES

There are no parties other than those listed in the caption.

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Pub. L. No. 104-88, 109 Stat. 803 (1995), *recodified as amended at* 49 U.S.C. § 14501(c)(1) 2n

BRIEF IN OPPOSITION

Respondent, Peter Cole, respectfully submits this Brief in Opposition to the petition for writ of certiorari. This issue is presently before the Court in *Ours Garage and Wrecker Serv. v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S.Ct. 802 (Jan. 4, 2002) (argued April 23, 2002). The petition presents no legal issue distinct from the petition in *Ours Garage*. Because the Fifth, Sixth, Ninth, and Eleventh Circuits were correct in determining that 49 U.S.C. § 14501(c)(2)(A) does not preserve the authority of political subdivisions to regulate motor carriers of property, the petition for writ of certiorari should be denied.

BACKGROUND

On January 26, 2000, the Petitioner, City of Dallas, Texas ("City") repealed and re-enacted Dallas City Ordinance 24175 ("Chapter 48A") of the Dallas City Code. The relevant portions of Chapter 48A are included in the petition for review at Appendix D. (Pet. at 13a). Respondent, Peter Cole ("Cole") attaches Chapter 48A in its entirety. [1] (App. at 1a). Chapter 48A regulates tow truck operations in the City of Dallas. (App. at 2a). Other cities have enacted ordinances regulating towing operations similar to the City. *See, e.g., Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (regulations enacted by city of San Antonio); *People Ex rel Renne v. Servantes*, 86 Cal.App.4th 1081 (Cal. Ct. App. 2001), *review denied*,

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[1] It should be noted at the outset that under petitioner's construction every city in which respondent conducts business (as many as 30 separate jurisdictions in and around Dallas/Fort Worth) would be authorized to enact regulations such as c. 48A. (App. 1a-59a).

(Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (regulations enacted by city of San Francisco).

Cole agrees with the City that, traditionally, cities and States have been free to regulate motor carriers with respect to the *intrastate* transportation of property. (Pet. at 18-19). In 1994, however, Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA"), a sweeping *deregulatory* statute prohibiting States or political subdivisions thereof to enact or enforce laws, regulations, or provisions having the force and effect of law related to the price, route, or service of intrastate motor carriers of property.[2] After passage of the FAAAA, courts struggled with the definition of "motor carrier of property" and whether Congress intended to preempt State and local regulation of tow truck operations. *See, e.g.*, 426 *Bloomfield Ave. Corp. v. City of Newark*, 904 F.Supp. 364 (D.N.J. 1995) (holding after lengthy discussion and analysis that towing companies are not motor carriers for purpose of statute).

Then, in 1995, Congress passed the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").[3] In enacting the ICCTA, Congress made clear it intended to preempt State and local regulation of intrastate towing operations by adding an express exception to the express preemption clause allowing States and political subdivisions to set the maximum price for tows performed without the consent of the owner or operator of the vehicle. 49 U.S.C. § 14501(c)(2)(C). Since the enactment of the ICCTA, courts have unanimously held that § 14501(c)(1) preempts State and local regulation of towing

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[2] Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1607 (1994), *codified at* 49 U.S.C. § 11501(h)(1).

[3] Pub. L. No. 104-88, 109 Stat. 803, 804 (1995), *recodified as amended at* 49 U.S.C. § 14501(c)(1).

operations subject to the narrow exceptions at § 14501(c)(2)(A) & (c)(2)(C). *See, e.g., Stucky*, 260 F.3d at 424; *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d. Cir.), *cert. denied*, 528 U.S. 568 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999).

This case revolves around the City's attempt to regulate aspects of tow truck operations despite express preemption of same by Congress. As noted above, the City enacted a regulatory scheme directed at tow truck owners and operators including application fees (Dallas City Code Chapter 48A-8, 48A-14), driver's permits (48A-12), company licenses (48A-6), vehicle inspections (48A-44) and criminal penalties for alleged violations of the regulations (48A-50). The City's regulation requires a city-issued driver's permit and declares an individual ineligible for a driver's permit for five years after the individual is released from incarceration on a felony conviction for possession of a controlled substance. (App. at 48A-7). Cole submits that the City lacks authority to regulate tow truck operations, including requiring driver's permits, pursuant to Congress' express directives. Cole also contends that even if the City were allowed to regulate pursuant to § 14501(c)(2)(A), Chapter 48A is not a safety regulation "with respect to motor vehicles," and thus, is still preempted. The City counters that its regulations are saved from preemption en toto by the exception preserving the "safety regulatory authority with respect to motor vehicles" found at 49 U.S.C. § 14501(c)(2)(A). The district court rendered judgment against Cole based upon stipulated facts. (Pet. at 5; 4a-5a). While Cole's appeal was pending, the Fifth Circuit handed down

Stucky, supra. The City conceded that the holding in *Stucky* controlled the disposition of Cole's appeal. The Fifth Circuit vacated the district court's order and remanded the case to the district court. The petition by the City followed. This Court should deny the City's petition for the reasons discussed below.[4]

REASONS FOR DENYING THE WRIT

I. Presumption Against Preemption Inapplicable When Congress' Express Intention Is To Displace State and Local Laws.

The City relies heavily on the presumption that traditional police powers of States are not to be superceded with express direction and argues that Congress failed to specifically prohibit State delegation of authority to political subdivisions. (Pet. at 18). This reliance is misplaced for several reasons. First, this contention was rejected by four of the five federal circuit courts that have considered it. The Second Circuit in *Ace*, however, held that the express language of the statute did not overcome this presumption. The court of appeals in *Ace* based its starting presumption on its treatment of ERISA preemption. *Ace*, 171 F.3d at 773. This presumption is overcome when, as in § 14501(c)(1), Congress undoubtedly intended to displace state and local laws. Cases involving Congress' intention to preempt state law, especially in field preemption cases, lend themselves to the starting presumption that Congress did not intend to supplant state law because in field

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[4] This issue has been fully briefed by the City as an amicus for Petitioner in *Ours Garage, supra.* In addition, counsel for Cole is also counsel for amicus VRC, LLC, which filed an amicus brief in support of Respondent in *Ours Garage.* Counsel for both parties attended oral argument. Notwithstanding, Cole files this response pursuant to the Court's request.

(or implied) preemption cases, courts are required to determine *whether* Congress intended to preempt as opposed to the *extent* of preemption. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (opinion of Blackmun, J.).

On the other hand, however, it is not appropriate to apply this presumption in *express preemption* cases where Congress was clear and unambiguous as to the scope and purpose of preemption. It would be an odd exercise indeed to measure § 14501(c)(1) against a presumption that Congress did not intend to supplant state and local laws. To do so would require a court to begin its analysis by presuming Congress did not intend to preempt state law despite Congress' express directive to the contrary. Presumably, that is why this Court, in analyzing the *identical preemptive language* from the Airline Deregulation Act ("ADA"),[5] did not apply (or even mention) this presumption in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) or subsequently in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). For this reason, it is inappropriate when construing § 14501(c)(1) to begin with the presumption that Congress did not intend to supplant state and local laws.

This Court did, however, make clear in *Cipollone* that "the historic police powers of the States [are] not to be superseded unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As noted above, this presumption boils down to simply that courts will not assume Congress intended to preempt state laws unless Congress expressly does so, or impliedly does so by occupying the field with its own regulation, or states pass laws that conflict with federal law. There

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[5] 49 U.S.C. § 1305(a)(1) *recodified at* 49 U.S.C. § 41713.

is no dispute in this case that Congress' manifest purpose was to supersede state and local laws. Therefore, the presumption that State laws will not be superseded unless Congress clearly says so is overcome by the fact that Congress, in plain language, said so.

The Second Circuit in *Ace* also made a distinction that regulations imposing only "incidental economic burdens" were not preempted. *Ace*, 171 F.3d at 774. The *Ace* court, however, failed to explain how this finding shielded the regulations from express preemption. The "incidental burden" analysis seems akin to this Court's statement in *Morales* that "some state actions may affect [airline fares] in too tenuous, remote or peripheral a manner to have pre-emptive effect." *Morales*, 504 U.S. at 390 (internal quotations omitted). This Court's statement in *Morales* clearly contemplates a law or state action that would escape the general preemption clause in the first instance. *Id.* (stating with respect to "obscene depictions that "the connection would obviously be far more tenuous."). This point is made crystal clear by this Court's treatment of the Illinois Supreme Court's decision in *Wolens v. American Airlines, Inc.*, 626 N.E.2d 205, 208 (Ill. 1993), holding that frequent flyer programs were not "essential to but merely peripheral to the operation of an airline." *Wolens*, 513 U.S. at 226 ("*Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters essential from matters unessential to airline operations.") (internal quotations omitted).

In construing § 14501, the court of appeals in *Ace* erred when it balanced the "competing interests" of the presumption against preemption of historic state police powers and the "incidental economic burden" of otherwise preempted regulations. *Ace*, 171 F.3d at 774. Courts are not free to balance competing

interests in the face of a clear and unambiguous directive from Congress. Otherwise, Congress' directive would have little force. Congress has weighed the competing interests involved and has decided in favor of *deregulating* motor carriers of property by expressly preempting state and local regulations in spite of any presumptions to the contrary.

In conducting its balancing act, the court of appeals in *Ace* incorrectly applied this Court's statement in *Morales* as an exception to the express preemption clause. This Court's statement in *Morales* regarding a state law or action that may be too tenuous or remote to be preempted assists courts in determining Congress' intent as to the scope of *whether* a law "relates to" the preempted field. *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). It does not establish an exception to express preemption. *See id. See also State v. Foley*, 950 S.W.2d 781, 786 (Tex.App.–Austin 1997, no writ) ("Saying state action is too remote, tenuous, or peripheral to fall within a deregulation statute is just another way of saying the legislature did not intend to prohibit the state action of which the plaintiff complains."). In other words, if Congress intended to preempt the subject regulations, the burden imposed on the targeted industry by the regulations is irrelevant. Notwithstanding the presumption against preemption of traditional police powers, because regulations enacted by the City "relate to" the price, route, and service of motor carriers and are not "too tenuous or remote" to be preempted, the court of appeals opinion should be affirmed unless the City demonstrates the challenged regulations fall into one of the exceptions contained in statute.

II. Preservation of State Authority Is Substantive, Not Formal.

At first blush it may seem the reservation of authority exclusively to States is illusory. Scrutiny of the statute and its *deregulatory* purpose, however, reveals that Congress did not intend to simply deny municipalities the honor of enacting regulations only to allow States to enact the same city-specific regulations. If Congress intended to prohibit regulation of motor carriers by political subdivisions and vest that authority exclusively with States proper, then city-specific regulations enacted at the State level would be preempted as well. Congress' primary reason for preempting State and local regulations and preserving only State motor vehicle safety regulations was to *reduce* the number of diverse regulatory schemes with which national and regional carriers are required to comply.

The fact that the State of Texas may enact Chapter 48A applicable only in the city of Dallas, and other regulatory schemes for other specific cities, frustrates, even defeats, Congress attempt to deregulate the motor carrier industry because it *increases* the number and complexity of regulations with which motor carriers have to comply. This result is contrary to Congress' purpose in enacting the ICCTA. *See Tocher*, 219 F.3d at 1048 (purpose of statute to deregulate motor carrier industry because disparate regulation is inefficient and reduced competition and innovation); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 695 (5th Cir. 1999) (purpose of statute is elimination of state and local regulation that reduces competition and curtails expansion of markets); *Ace*, 171 F.3d at 772 (purpose of statute was to free motor carrier industry from state and local regulation); *Mayer*, 158 F.3d at 544 (purpose of statute is to foster increased competition in the

motor transportation industry by eliminating a tangled web of state and local regulations). As a result, the reservation of authority to "States" would not allow States to simply enact numerous city or region specific regulations at the State level.

III. Federal Railway Safety Act Is An Example Of Preservation of Exclusive State Safety Authority.

The United States Courts of Appeal for the Fifth and Sixth Circuits and other state and federal courts have faced this issue with regard to similar deregulatory statutes and held that reservation of authority to *States* does not necessarily encompass delegation of that authority to their political subdivisions. *See, e.g., CSX Transportation, Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996) (holding safety exception granted exclusively to "States" in the Federal Railway Safety Act ("FRSA") did not apply to municipalities); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) (holding same with regard to FRSA); *Grand Trunk W. R.R. v. City of Fenton*, 439 N.W.2d 706 (Mich. 1992), *cert. denied*, 507 U.S. 1050 (1993) (holding FRSA safety exceptions apply to State only and not to local governments). *See also Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 829 (6th Cir. 1986) (holding omission of political subdivisions in preemption provision of Occupational Safety and Health Act ("OSHA") was intentional).

In *Donelon*, local officials claimed authority to act under a statutory exception allowing *State* safety regulations in the Federal Railway Safety Act[6] ("FRSA"). *Donelon*, 474 F.2d at 1112-113. The Fifth

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[6] Pub. L. No. 91-458, Title II, 84 Stat. 1705 (Oct. 24, 1978), *codified as amended at* 49 U.S.C. § 20101 *et. seq.*

Circuit did not analyze the regulations because, as a threshold matter, the court held that the parish officials of the local government were not a "State" for purposes of the FRSA and therefore did not fit within the exception. *See id.* at 1113 (citing *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 445 F.2d 301 (5th Cir. 1971)). The *Donelon* holding was later followed by the Sixth Circuit in *CSX Transportation, Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996).

In *CSX*, using the same logical approach as *Donelon*, the court of appeals held that the FRSA reserved a specific exception to "States" to regulate railway safety in the absence of regulations promulgated by the Secretary of Transportation. *See id.* at 628. The court was clear that because the City of Plymouth was not a *State* as defined by the statute, its ordinance was preempted even though it was targeted specifically at safety. *See id.* The court of appeals in *CSX* came to this conclusion despite the fact that the City of Plymouth was acting under an express delegation of authority from the State. *CSX*, 86 F.3d at 628 (citing *CSX Transp., Inc. v. City of Thorsby*, 741 F.Supp. 889, 891 (M.D. Ala. 1990) ("It is a city ordinance and not a state law or regulation which is at issue. The fact that the city may have acted on delegated [State] authority does not detract from . . . this dispositive fact.")). This fact bolsters the point made by the Ninth Circuit in *Tocher* that to adopt Petitioner's construction would "lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *Tocher*, 219 F.3d at 1051.[7]

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[7] There are certainly occasions, like that in § 14501(c)(2)(A), on which Congress may wish to preempt regulation by political subdivisions while leaving the States' regulatory authority intact. *See generally, Mortier*, 501 U.S. at 616 (opinion of Scalia, J.) (recognizing that in certain circumstances it could make "eminent sense" to authorize regulation by States but not political subdivisions).

IV. Textual Clues Support Majority Rule.

Under Petitioner's construction, it would be unnecessary to ever define "State" as including political subdivisions. In the ICCTA, Congress has found it necessary, however, to define "State" without including political subdivisions. Petitioner's construction would require this Court to disregard two well-recognized canons of statutory construction requiring courts to (1) give similar language in the same statutory section consistent meaning and (2) all words in a statute should be given effect. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

Petitioner's construction becomes more untenable given that Congress altered the definition of "State" to *include* political subdivisions within the same statute. This confirms that Congress was well aware that the definition of "State" at § 13102(18) excluded political subdivisions. Otherwise, it would have been unnecessary for Congress to expressly alter the definition of "State" for purposes of specific statutory sections. *See, e.g.*, 49 U.S.C. § 31132(7)-(9).

The clearest example of Congress' intent can be found in § 31142(c)(1)(A)-(C). Congress expressly provided that the Secretary of Transportation promulgate regulations regarding the safety inspection of motor vehicles. 49 U.S.C. § 31142(b). Congress, however, also provided that:

> Except as provided in paragraph (2) of this subsection, this subchapter and section 31102 of this title do not–
>
> (A) prevent a State or voluntary group of States from imposing more stringent

> standards for use in their own periodic roadside inspection programs of commercial vehicles;

49 U.S.C. § 31142(c)(1)(A). This phraseology is similar to that used in § 14501(c)(2)(A) in which Congress declared that the preemption provision in paragraph (1) "shall not restrict" the authority of a State. Here, Congress declared that the inspection provision "do not prevent" a State from imposing more stringent standards. Congress, however, altered the definition of "State" to *include* political subdivisions for purposes of this section. *See* 49 U.S.C. § 31132(7). Thus, had Congress intended "State" to include the regulatory authority of political subdivisions in § 14501(c)(2)(A), Congress could have altered the definition of "State" in § 30101(18) to *include* political subdivisions.

Petitioner's construction that the regulatory authority of a State included the authority to delegate its authority to political subdivisions is belied by the fact that Congress expressly *included* political subdivision in the definition of State for purposes of § 31142 despite Petitioner's contention that authority reserved or conveyed on a State includes the power to delegate that authority. Had Congress intended the result urged by Petitioner, it would have been simple and consistent to simply define "State" to include political subdivisions for purposes of § 14501. In that case, Congress could have declared that a "State" may not enact or enforce the prohibited laws and the exception at § 14501(c)(2)(A) could be worded the same. Instead, however, despite Congress' ability to define State to *include* political subdivisions, and its employment of said definition in other sections of the statute, Congress decided to define State to *exclude* political subdivision. *Compare* 49 U.S.C. § 31132(7) *with* 49 U.S.C. § 13102(18).

Petitioner's construction would render every definition of State that includes political subdivision superfluous and unnecessary because under Petitioner's theory, the authority of a State always includes the power to delegate its authority to its agents. Unfortunately for Petitioner, Congress does not share this view and has gone to great lengths to define terms specifically for purposes of this and many other federal laws.

Further, Petitioner's construction also ignores the qualifying phrase "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). Petitioner contends that its regulations are saved from preemption by the so-called "safety exception." Despite the fact that political subdivisions lack authority to regulate pursuant to § 14501(c)(2)(A), Petitioner's contentions demonstrate a further misreading of the exception. First, the exception is more limited than an exception for "public safety." Section 14501(c)(2)(A) clearly allows continued State regulation of *motor vehicle* safety. "Motor vehicle safety" is defined as

> the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

49 U.S.C. § 30102(a)(8). Thus, Congress narrowed the safety exception with the qualifying phrase "with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A).

The Dallas court of appeals addressed this language:

> Preliminarily, we note that the 'safety exception' is, in part, a misnomer. Rather than being a general exception for safety-related regulation concerning motor carriers, the exception is more narrowly drawn than commonly recognized. . . . Therefore, the preemption provision applies to 'motor carriers,' while the safety exception applies only to 'motor vehicles.' Congress is presumed to choose its words carefully and to mean what it says. We must assume Congress did not mean to exempt all safety regulation pertaining to motor carriers when it used the more narrow qualifying words, 'motor vehicles.'

Whitten v. Vehicle Removal Corp., 56 S.W.3d 293, 305 (Tex.App.–Dallas 2001, pet. filed).

This is made more clear by the fact that in the same exception Congress reserved authority of States to enact regulations with respect to highway routing of hazardous cargo. Certainly, had Congress intended § 14501(c)(2)(A) to be an all-encompassing general welfare exception, it would have been unnecessary to include reference to hazardous cargo or size and weight restrictions as well. *See Whitten*, 56 S.W.3d at 306 ("If the safety exception in the first clause is read so broadly as to include any regulation touching on safety, it would appear the second clause would clearly be encompassed in the first and, therefore, unnecessary."). Notwithstanding political subdivisions lack of regulatory authority, Petitioner's construction of § 14501(c)(2)(A) ignores the text and attempts to squeeze the square peg of permits, application fees, and record requirements into the round hole of motor vehicle safety.

V. Mortier Does Not Mandate Contrary Result.

Petitioner relies heavily on this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) to support its construction that § 14501(c)(2)(A) allows local regulation of motor carriers. *Mortier* is inapposite and does not mandate the result urged by Petitioner.

First, *Mortier* dealt with a *regulatory* statute, the Federal Insecticide, Fungicide, and Rodenticide Act[8] ("FIFRA"), which did not seek to supplant State or local authority by its express terms. *Mortier*, 501 U.S. at 606. This Court made clear that FIFRA did not preempt State law in the area of insecticide regulation by express, field, or conflict preemption. *Id.*

FIFRA specifically called for a partnership between the EPA and State and local governments in monitoring and enforcing FIFRA. *Id.* at 615. The Court explained that FIFRA actually encouraged additional State and local regulation. *Id.* at 607. *See also id.* at 614 ("the statute leaves ample room for States and localities to supplement federal efforts"). Obviously, 7 U.S.C. § 136 *et seq.* is distinguishable from 49 U.S.C. § 14501, which leaves no room for State or local regulation save for the narrow exceptions found at § 14501(c)(2)(A) and (c)(2)(C).

Congress expressly preempted state and local regulation of intrastate property transportation. That was not the case with FIFRA. *Mortier*, 501 U.S. at 606 ("FIFRA nowhere expressly supersedes local regulation of pesticide use."). Thus, FIFRA and ICCTA were enacted to serve distinctly different purposes.

FIFRA is also distinguishable from ICCTA in that FIFRA is a public safety regimen that was

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[8] 7 U.S.C.A. § 136 *et.seq.* (1972).

expanded, *i.e.*, made more restrictive, by amendments in 1972. *Mortier*, 501 U.S. at 601 ("1972 amendments transformed FIFRA . . . into a comprehensive regulatory statute.") (internal quotations omitted). FIFRA also included provisions authorizing the EPA director to delegate certain enforcement actions to State and local governmental entities. *Mortier*, 501 U.S. at 601-02, 608. The ICCTA, on the other hand, is a *deregulatory* statute. It strips authority from States and political subdivisions with regard to motor carriers of property completely save for narrowly and carefully crafted exceptions. No partnership is intended and no room for supplementation is afforded.

In *Mortier*, this Court rejected the construction that States were prohibited from delegating authority to political subdivisions under FIFRA despite Congress' exclusive definition of State because *all other factors* utilized in determining Congress' intent recommended against such a construction. FIFRA lacked the "explicit pre-emptive language" necessary to overcome the presumption against federal preemption of State laws. *Mortier*, 501 U.S. at 605. What FIFRA lacked, the ICCTA contains in abundance. In addition to the plain language of the express preemption provision, every interpretive tool at this Court's disposal counsels in favor of finding that Congress intended to prohibit local regulation of motor carriers of property. As a result, the court of appeals was correct, as was the Fifth, Ninth, and Eleventh Circuits, in holding that § 14501(c)(2)(A) does not allow regulation of motor carriers by political subdivisions.

CONCLUSION

This Court should deny Petitioner's writ of certiorari.

Respectfully submitted,

JAMES C. MOSSER
BYRON K. HENRY
MOSSER MALLERS PLLC
17110 Dallas Parkway, Suite 290
Dallas, Texas 75248
(972) 733-3223

APPENDIX A

DALLAS CITY CODE

CHAPTER 48A

VEHICLE TOW SERVICE

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ARTICLE I.

GENERAL PROVISIONS.

SEC. 48A-1. STATEMENT OF POLICY.

It is the policy of the city to provide for the protection of the public interest as it relates to the parking of vehicles on private property and to the removal of those vehicles to vehicle storage facilities without the consent of the vehicle owners or operators. To this end, this chapter provides for the regulation of vehicle tow service, to be administered in a manner that protects the public health and safety and promotes the public convenience and necessity. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-2. GENERAL AUTHORITY AND DUTY OF DIRECTOR.

The director shall implement and enforce this chapter and may by written order establish such rules and regulations, consistent with this chapter, as may be determined necessary to discharge the director's duty under, or to effect the policy of, this chapter. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-3. ESTABLISHMENT OF RULES AND REGULATIONS.

(a) Before adopting, amending, or abolishing a rule or regulation, the director shall hold a public hearing on the proposal.

(b) The director shall fix the time and place of the hearing and, in addition to notice required under the Open Meetings Act (Chapter 551, Texas Government Code), as amended, shall notify each licensee and such other persons as the director determines are interested in the subject matter of the hearing.

(c) After the public hearing, the director shall notify the licensees and other interested persons of the action taken and shall post an order adopting, amending, or abolishing a rule or regulation on the official bulletin board in the city hall for a period of not fewer than 10 days. The order becomes effective immediately upon expiration of the posting period. (Ord. Nos. 21435; 24175)

SEC. 48A-4. EXCEPTIONS.

This chapter does not apply to:

(1) a person towing a vehicle with the consent of the vehicle owner or operator;

(2) the removal of a vehicle from private property with the consent of the vehicle owner or operator;

(3) a person parking or storing a vehicle with the consent of the vehicle owner or operator;

(4) the parking or storing of a vehicle with the consent of the vehicle owner or operator; or

(5) a vehicle storage facility at which vehicles are parked or stored solely with the consent of the vehicle owner or operator. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-5. DEFINITIONS.

In this chapter:

(1) CITY means the city of Dallas, Texas.

(2) CHIEF OF POLICE means the chief of police for the city of Dallas or a designated representative.

(3) CONVICTION means a conviction in a federal court or court of any state or foreign nation or political subdivision of a state or foreign nation that has not been reversed, vacated, or pardoned.

(4) DIRECTOR means the director of the department designated by the city manager to enforce and administer this chapter, and includes representatives, agents, and department employees designated by the director.

(5) DRIVER means an individual who drives or operates a wrecker.

(6) HEAVY DUTY WRECKER means a wrecker that has:

(A) a manufacturer's gross vehicle weight rating of not less than 48,000 pounds; and

(B) either:

(i) a power operated winch, winch line, and boom, with a factory-rated lifting capacity of not less than 50,000 pounds and a dual line capacity of not less than 20,000 pounds; or

(ii) an underlift device with a factory-rated lifting capacity of not less than 10,000 pounds when extended.

(7) ILLEGALLY PARKED or UNAUTHORIZED VEHICLE means a vehicle that is:

(A) parked, stored, or located on private property without the consent of the property owner;

(B) parked in or obstructing a fire lane, aisle, entrance, exit, driveway, or other area not designated for the parking of vehicles; or

(C) parked in an area designated for the parking of vehicles but fails to display a valid parking decal, emblem, badge, sticker, ticket, or other identification required by the property owner for parking in a designated area or space.

(8) LAWFUL ORDER means a verbal or written directive that:

(A) is issued by the director in the performance of official duties in the enforcement of this chapter and any rules and regulations promulgated under this chapter; and

(B) does not violate the United States Constitution or the Texas Constitution.

(9) LICENSEE means a person licensed under this chapter to engage in vehicle tow service. The term includes any owner or operator of the licensed business, but does not include a subcontractor unless the use of the subcontractor is authorized pursuant to Section 48A-7(e) of this chapter.

(10) LIGHT DUTY WRECKER means a wrecker that has:

(A) a manufacturer's gross vehicle weight rating of not less than 10,000 pounds; and

(B) either:

(i) a power operated winch, winch line, and boom, with a factory-rated lifting capacity of not less than 8,000 pounds, single line capacity; or

(ii) an underlift device with a factory-rated lifting capacity of not less than 3,000 pounds when extended.

(11) MEDIUM DUTY WRECKER means a wrecker that has:

(A) a manufacturer's gross vehicle weight rating of not less than 18,000 pounds; and

(B) either:

(i) a power operated winch, winch line, and boom, with a factory-rated lifting capacity of not less than 24,000 pounds and a dual line capacity of not less than 8,000 pounds; or

(ii) an underlift device with a factory-rated lifting capacity of not less than 6,000 pounds when extended.

(12) OPERATE means to drive or to be in control of a wrecker.

(13) OPERATOR means the the holder of a vehicle tow service license.

(14) PERMITTEE means an individual who has been issued a wrecker driver's permit under this chapter.

(15) PERSON means an individual, assumed name entity, partnership, joint-venture, association, corporation, or other legal entity.

(16) POLICE DEPARTMENT means the police department of the city of Dallas.

(17) PROPERTY ENTRANCE means any point located on private property that is designed to provide access by a vehicle to the private property.

(18) PROPERTY OWNER means a person, or the person's agent or lessee, who holds legal title, deed, or right-of-occupancy to private property, but does not include a vehicle tow service licensee or an employee or representative of a vehicle tow service licensee.

(19) STREET means any public street, alley, road, right-of-way, or other public way within the corporate limits of the city. The term includes all paved and unpaved portions of the right-of-way.

(20) VEHICLE means a device in, on, or by which a person or property may be transported on a public street. The term includes, but is not limited to, an operable or inoperable automobile, truck, motorcycle, recreational vehicle, or trailer, but does not include a device moved by human power or used exclusively on a stationary rail or track.

(21) VEHICLE OWNER or OPERATOR means a person, or the designated agent of a person, who:

(A) holds legal title to a vehicle, including any lienholder of record; or

(B) has legal right of possession or legal control of a vehicle.

(22) VEHICLE STORAGE FACILITY has the meaning given that term in the Vehicle Storage Facility Act.

(23) VEHICLE STORAGE FACILITY ACT means Article 6687-9a, Vernon's Texas Civil Statutes, as amended.

(24) VEHICLE TOW SERVICE means the business of towing an illegally parked or unauthorized vehicle from private property.

(25) WRECKER means a vehicle designed for the towing of other vehicles.

(26) WRECKER DRIVER'S PERMIT means a permit issued under this chapter to an individual by the director authorizing that individual to operate a wrecker for a vehicle tow service in the city. (Ord. Nos. 19099; 19312; 21435; 23106; 24175)

ARTICLE II.

VEHICLE TOW SERVICE LICENSE.

SEC. 48A-6. LICENSE REQUIRED; APPLICATION.

(a) A person commits an offense if, within the city, he, or his agent or employee:

(1) engages in vehicle tow service for compensation without a valid vehicle tow service license issued by the director under this article;

(2) causes a vehicle to be removed from private property, without the consent of the vehicle owner or operator, by a vehicle tow service not licensed by the director under this article; or

(3) employs or contracts with a vehicle tow service not licensed by the director under this article for the purpose of having a vehicle removed from private property without the consent of the vehicle owner or operator.

(b) To obtain a vehicle tow service license, a person must make written application to the director upon a form provided for that purpose. The application must be signed by the person who will own, control, or operate the proposed vehicle tow service. The application must be verified and include the following:

(1) the name, address, and telephone number of the applicant, the trade name under which the applicant does business, the street address and telephone number of the vehicle tow service establishment, and the name, street address, and telephone number of each vehicle storage facility used by the vehicle tow service;

(2) the number and types of vehicles to be operated, including the year, make, model, vehicle identification number, and state license plate number of, and the type of winch to be operated on, each wrecker;

(3) documentary evidence from an insurance company indicating a willingness to provide liability insurance as required by this chapter;

(4) a statement attesting that each wrecker used by the vehicle tow service has been rendered for ad valorem taxation in the city and that the applicant is current on payment of those taxes;

(5) a list, to be kept current, of the owners and management personnel of the vehicle tow service, and of all employees who will participate in

vehicle tow service, including names, dates of birth, state driver's license numbers, social security numbers, and wrecker driver's permit numbers;

(6) a copy of a written agreement, if one exists, between the vehicle tow service and each vehicle storage facility used by the tow service, other than its own, and proof that each vehicle storage facility used is currently licensed under the Texas Vehicle Storage Facility Act;

(7) a list of what methods of payment the applicant will accept from a vehicle owner for vehicle tow service;

(8) any other information deemed necessary by the director; and

(9) a nonrefundable application processing fee of $50.

(c) A person desiring to engage in vehicle tow service shall register with the director a trade name that clearly differentiates the person's company from all other companies engaging in vehicle tow service and shall use no other trade name for the vehicle tow service. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-7. LICENSE QUALIFICATIONS.

(a) To qualify for a vehicle tow service license, an applicant must:

(1) be at least 19 years of age;

(2) be currently authorized to work full-time in the United States;

(3) be able to communicate in the English language; and

(4) not have been convicted of a crime:

(A) involving:

(i) criminal homicide as described in Chapter 19 of the Texas Penal Code;

(ii) kidnapping as described in Chapter 20 of the Texas Penal Code;

(iii) a sexual offense as described in Chapter 21 of the Texas Penal Code;

(iv) an assaultive offense as described in Chapter 22 of the Texas Penal Code;

(v) robbery as described in Chapter 29 of the Texas Penal Code;

(vi) burglary as described in Chapter 30 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(vii) theft as described in Chapter 31 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(viii) fraud as described in Chapter 32 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(ix) tampering with a governmental record as described in Chapter 37 of the

Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(x) public indecency (prostitution or obscenity) as described in Chapter 43 of the Texas Penal Code;

(xi) the transfer, carrying, or possession of a weapon in violation of Chapter 46 of the Texas Penal Code, or of any comparable state or federal law, but only if the violation is punishable as a felony under the applicable law;

(xii) a violation of the Dangerous Drugs Act (Article 4476-14, Vernon's Texas Civil Statutes), or of any comparable state or federal law, but only if the violation is punishable as a felony under the applicable law;

(xiii) a violation of the Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes), or of any comparable state or federal law, but only if the violation is punishable as a felony under the applicable law;

(xiv) criminal attempt to commit any of the offenses listed in Subdivision (4)(A)(i) through (xiii) of this subsection; and

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the applicant was convicted of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if, within any 24-month period, the applicant has two or more convictions of any misdemeanor offense or combination of misdemeanor offenses;

(5) not be addicted to the use of alcohol or narcotics;

(6) be subject to no outstanding warrants of arrest;

(7) not employ any person who is not qualified under this subsection.

(b) An applicant who has been convicted of, or who employs a person who has been convicted of, an offense listed in Subsection (a)(4), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a vehicle tow service license only if the director determines that the applicant, or the employee, is presently fit to engage in the business of a vehicle tow service. In determining present fitness under this section, the director shall consider the following:

(1) the extent and nature of the applicant's, or employee's, past criminal activity;

(2) the age of the applicant, or employee, at the time of the commission of the crime;

(3) the amount of time that has elapsed since the applicant's, or employee's, last criminal activity;

(4) the conduct and work activity of the applicant, or employee, prior to and following the criminal activity;

(5) evidence of the applicant's, or employee's, rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of the applicant's, or employee's, present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the applicant, or employee; the sheriff and chief of police in the community where the applicant, or employee, resides; and any other persons in contact with the applicant, or employee.

(c) It is the responsibility of the applicant, to the extent possible, to secure and provide to the director the evidence required to determine present fitness under Subsection (b) of this section.

(d) A licensee shall maintain a permanent and established place of business at a location within the city where a vehicle tow service is not prohibited by the Dallas Development Code. A licensee shall use only vehicle storage facilities located within the city where a vehicle storage facility is not prohibited by the Dallas Development Code.

(e) A licensee shall use employees only to provide vehicle tow service; except, that vehicle tow services licensed under this article may subcontract with each other to provide tow service. (Ord. Nos. 19099; 21282; 21435; 24175)

SEC. 48A-8. LICENSE ISSUANCE; FEE; DISPLAY; TRANSFERABILITY; EXPIRATION.

(a) The director shall, within 30 days after the date of application, issue a vehicle tow service license to an applicant who complies with the provisions of this article.

(b) A license issued to a vehicle tow service authorizes the licensee and any bona fide employee to engage in vehicle tow service.

(c) The annual fee for a vehicle tow service license is $1,650, prorated on the basis of whole months. The fee for issuing a duplicate license for one lost, destroyed, or mutilated is $5. The fee is payable to the director upon issuance of a license. No refund of a license fee will be made.

(d) A vehicle tow service license issued pursuant to this article must be conspicuously displayed in the vehicle tow service establishment.

(e) A vehicle tow service license, or any accompanying permit, badge, sticker, ticket, or emblem, is not assignable or transferable.

(f) A vehicle tow service license expires June 30 of each year and may be renewed by applying in accordance with Section 48A-6. Application for renewal must be made not less than 30 days or more than 60 days before expiration of the license and must be accompanied by the annual license fee. (Ord. Nos. 19099; 19300; 21435; 24175)

SEC. 48A-9. REFUSAL TO ISSUE OR RENEW LICENSE.

(a) The director shall refuse to issue or renew a vehicle tow service license if the applicant or licensee:

(1) intentionally or knowingly makes a false statement as to a material matter in an application for a license or license renewal, or in a hearing concerning the license;

(2) has been convicted twice within a 12-month period or three times within a 24-month period for violation of this chapter or has had a vehicle tow service license revoked within two years prior to the date of application;

(3) uses a trade name for the vehicle tow service other than the one registered with the director;

(4) is not qualified under Section 48A-7 of this article;

(5) uses a subcontractor to provide vehicle tow service, unless the use of the subcontractor is authorized pursuant to Section 48A-7(e) of this chapter; or

(6) has been finally convicted for violation of another city, state, or federal law that indicates a lack of fitness of the applicant to perform vehicle tow service.

(b) If the director determines that a license should be denied the applicant or licensee, the director shall notify the applicant or licensee in writing that the application is denied and include in the notice the specific reason or reasons for denial and a

statement informing the applicant or licensee of the right to, and process for, appeal of the decision. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-10. REVOCATION OF LICENSE.

The director shall revoke a vehicle tow service license if the director determines that the licensee has:

(1) intentionally or knowingly made a false statement as to a material matter in the application or hearing concerning the license;

(2) intentionally or knowingly failed to comply with applicable provisions of this chapter or with the conditions and limitations of the license;

(3) operated a towing service not authorized by the license or other applicable law;

(4) been finally convicted for violation of another city, state, or federal law that indicates a lack of fitness of the licensee to perform vehicle tow service;

(5) is under indictment for or has been convicted of any felony offense while holding a license;

(6) does not qualify for a license under Section 48A-7 of this chapter; or

(7) failed to pay a license fee required under this chapter. (Ord. Nos. 21435; 24175)

SEC. 48A-11. APPEALS.

Any person whose application for a license or license renewal is denied by the director, or a licensee whose license has been revoked or suspended by the director, may file an appeal with a permit and license

appeal board in accordance with Section 2-96 of this code. (Ord. Nos. 21435; 24175)

ARTICLE III.

WRECKER DRIVER'S PERMIT.

SEC. 48A-12. WRECKER DRIVER'S PERMIT REQUIRED.

(a) A person commits an offense if he operates a wrecker engaged in vehicle tow service in the city without a valid wrecker driver's permit issued to the person under this article.

(b) A licensee commits an offense if he employs or otherwise allows a person to operate for compensation a wrecker owned, controlled, or operated by the licensee unless the person has a valid wrecker driver's permit issued under this article. (Ord. Nos. 21435; 24175)

SEC. 48A-13. QUALIFICATIONS FOR A WRECKER DRIVER'S PERMIT.

(a) To qualify for a wrecker driver's permit, an applicant must:

(1) be at least 19 years of age;

(2) be currently authorized to work full-time in the United States;

(3) hold a valid driver's license issued by the State of Texas;

(4) be able to communicate in the English language;

(5) not be afflicted with a physical or mental disease or disability that is likely to prevent the applicant from exercising ordinary and reasonable control over a motor vehicle or that is likely to otherwise endanger the public health or safety, as determined by a medical doctor licensed to practice medicine in the United States;

(6) not have been convicted of more than four moving traffic violations arising out of separate transactions, nor involved in more than two motor vehicle accidents in which it could be reasonably determined that the applicant was at fault, within any 12 month period during the preceding 36 months;

(7) not have been convicted of a crime:

(A) involving:

(i) criminal homicide as described in Chapter 19 of the Texas Penal Code;

(ii) kidnapping as described in Chapter 20 of the Texas Penal Code;

(iii) a sexual offense as described in Chapter 21 of the Texas Penal Code;

(iv) an assaultive offense as described in Chapter 22 of the Texas Penal Code;

(v) robbery as described in Chapter 29 of the Texas Penal Code;

(vi) burglary as described in Chapter 30 of the Texas Penal Code, but only if the offense was committed against a person

with whom the applicant came in contact while engaged in vehicle tow service;

(vii) theft as described in Chapter 31 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(viii) fraud as described in Chapter 32 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service;

(ix) tampering with a governmental record as described in Chapter 37 of the Texas Penal Code, but only if the offense was committed against a person with whom the applicant came in contact while engaged in vehicle tow service,

(x) public indecency (prostitution or obscenity) as described in Chapter 43 of the Texas Penal Code;

(xi) the transfer, carrying, or possession of a weapon in violation of Chapter 46 of the Texas Penal Code, or of any comparable state or federal law, but only if the violation is punishable as a felony under the applicable law;

(xii) a violation of the Dangerous Drugs Act (Article 4476-14, Vernon's Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law;

(xiii) a violation of the Controlled Substances Act (Article 4476-15, Vernon's

Texas Civil Statutes), or of any comparable state or federal law, that is punishable as a felony under the applicable law; or

(xiv) criminal attempt to commit any of the offenses listed in Subdivision (7)(A)(i) through (xiii) of this subsection;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the applicant was convicted of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the applicant was convicted of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if, within any 24-month period, the applicant has two or more convictions of any misdemeanor offense or combination of misdemeanor offenses;

(8) not have been convicted of, or discharged by probation or deferred adjudication for, driving while intoxicated:

(A) within the preceding 12 months; or

(B) more than one time within the preceding five years;

(9) not be addicted to the use of alcohol or narcotics;

(10) be subject to no outstanding warrants of arrest;

(11) be sanitary and well-groomed in dress and person;

(12) be employed by the licensee; and

(13) have successfully completed within the preceding 12 months a defensive driving course approved by the Texas Education Agency and be able to present proof of completion.

(b) An applicant who has been convicted of an offense listed in Subsection (a)(7) or (8), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a wrecker driver's permit only if the director determines that the applicant is presently fit to engage in the occupation of a wrecker driver. In determining present fitness under this section, the director shall consider the following:

(1) the extent and nature of the applicant's past criminal activity;

(2) the age of the applicant at the time of the commission of the crime;

(3) the amount of time that has elapsed since the applicant's last criminal activity;

(4) the conduct and work activity of the applicant prior to and following the criminal activity;

(5) evidence of the applicant's rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of the applicant's present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the applicant; the sheriff and chief of police in the community where the applicant resides; and any other persons in contact with the applicant.

(c) It is the responsibility of the applicant, to the extent possible, to secure and provide to the director the evidence required to determine present fitness under Subsection (b) of this section and under Section 48A-19 of this article. (Ord. Nos. 21435; 24175)

SEC. 48A-14. APPLICATION FOR WRECKER DRIVER'S PERMIT; FEE.

To obtain a wrecker driver's permit, or renewal of a wrecker driver's permit, a person must file with the director a completed written application on a form provided for the purpose and a nonrefundable application fee of $10. The director shall require each application to state such information as the director reasonably considers necessary to determine whether an applicant is qualified. (Ord. Nos. 21435; 24175)

SEC. 48A-15. INVESTIGATION OF APPLICATION.

(a) For the purpose of determining qualification under Section 48A-13(a)(5), the director may require an applicant to submit to a physical examination conducted by a licensed physician, at applicant's expense, and to furnish to the director a signed statement from the physician certifying that the physician has examined the applicant and that in

the physician's professional opinion the applicant is qualified under Section 48A-13(a)(5).

(b) Upon request of the director, the police department shall investigate each applicant and furnish the director a report concerning the applicant's qualification under Section 48A-13. The municipal court shall furnish the director a copy of the applicant's motor vehicle driving record and a list of any warrants of arrest for the applicant which might be outstanding.

(c) The director may conduct such other investigation as the director considers necessary to determine whether an applicant for a wrecker driver's permit is qualified.

(d) The director shall provide the applicant, upon written request, a copy of all materials contained in the applicant's file to the extent allowed under the Public Information Act (Chapter 552, Texas Government Code), as amended. (Ord. Nos. 21435; 24175)

SEC. 48A-16. ISSUANCE AND DENIAL OF WRECKER DRIVER'S PERMIT.

(a) The director shall issue a wrecker driver's permit to an applicant, unless the director determines that the applicant is not qualified.

(b) The director shall delay until final adjudication the approval of the application of any applicant who is under indictment for or has charges pending for:

(1) a felony offense involving a crime described in Section 48A-13(a)(7)(A)(i), (ii), (iii), (iv), or (v) or criminal attempt to commit any of those offenses; or

(2) any offense involving driving while intoxicated.

(c) The director shall deny the application for a wrecker driver's permit if the applicant:

(1) is not qualified under Section 48A-13;

(2) refuses to submit to or does not pass a medical examination authorized under Section 48A-15(a); or

(3) intentionally or knowingly makes a false statement of a material fact in an application for a wrecker driver's permit.

(d) If the director determines that a permit should be denied the applicant, the director shall notify the applicant in writing that the application is denied and include in the notice the specific reason or reasons for denial and a statement informing the applicant of the right to, and process for, appeal of the decision. (Ord. Nos. 21435; 24175)

SEC. 48A-17. EXPIRATION OF WRECKER DRIVER'S PERMIT; VOIDANCE UPON SUSPENSION OR REVOCATION OF STATE DRIVER'S LICENSE.

(a) Except in the case of a probationary or provisional permit, a wrecker driver's permit expires one year from the date of issuance.

(b) If a permittee's state driver's license is suspended or revoked by the state, the wrecker driver's permit automatically becomes void. A permittee shall notify the director and the licensee for whom the permittee drives within three days of a

suspension or revocation of a state driver's license and shall immediately surrender the wrecker driver's permit to the director. (Ord. Nos. 21435; 24175)

SEC. 48A-18. PROVISIONAL PERMIT.

(a) The director may issue a provisional wrecker driver's permit if the director determines that it is necessary pending completion of investigation of an applicant for a wrecker driver's permit.

(b) A provisional wrecker driver's permit expires on the date shown on the permit, which date shall not exceed 45 days after the date of issuance, or on the date the applicant is denied a wrecker driver's permit, whichever occurs first.

(c) The director shall not issue a provisional permit to a person who has been previously denied a wrecker driver's permit. (Ord. Nos. 21435; 24175)

SEC. 48A-19. PROBATIONARY PERMIT.

(a) The director may issue a probationary wrecker driver's permit to an applicant who is not qualified for a wrecker driver's permit under Section 48A-13 if the applicant:

(1) could qualify under Section 48A-13 for a wrecker driver's permit within one year from the date of application;

(2) holds a valid state driver's license or occupational driver's license; and

(3) is determined by the director, using the criteria listed in Section 48A-13(b) of this article, to be presently fit to engage in the occupation of a wrecker driver.

(b) A probationary wrecker driver's permit may be issued for a period not to exceed one year.

(c) The director may prescribe appropriate terms and conditions for a probationary wrecker driver's permit as the director determines are necessary. (Ord. Nos. 21435; 24175)

SEC. 48A-20. DUPLICATE PERMIT.

If a wrecker driver's permit is lost or destroyed, the director shall issue the permittee a duplicate permit upon payment to the city of a duplicate permit fee of $10. (Ord. Nos. 21435; 24175)

SEC. 48A-21. DISPLAY OF PERMIT.

A wrecker driver shall at all times conspicuously display a wrecker driver's permit on the clothing of the driver's upper body. A wrecker driver shall allow the director or a peace officer to examine the wrecker driver's permit upon request. (Ord. Nos. 21435; 24175)

SEC. 48A-22. SUSPENSION BY A DESIGNATED REPRESENTATIVE.

(a) If a duly authorized representative designated by the director to enforce this chapter determines that a permittee has failed to comply with this chapter (except Section 48A-13) or a regulation established under this chapter, the representative may suspend the wrecker driver's permit for a period of time not to exceed three days by personally serving the permittee with a written notice of the suspension. The written notice must include the reason for suspension, the date the suspension begins, the duration of the suspension, and a statement informing the permittee of the right of appeal.

(b) A suspension under this section may be appealed to the director or the director's assistant if the permittee requests an appeal at the time the representative serves notice of suspension or within 10 days after the notice of suspension is served. When an appeal is requested, the suspension may not take effect until a hearing is provided by the director or the director's assistant.

(c) The director may order an expedited hearing under this section, to be held as soon as possible after the permittee requests an appeal, but at least 10 days advance notice of the hearing must be given to the permittee. The director may affirm, reverse, or modify the order of the representative. The decision of the director is final. (Ord. Nos. 21435; 24175)

SEC. 48A-23. SUSPENSION OF WRECKER DRIVER'S PERMIT.

(a) If the director determines that a permittee has failed to comply with this chapter (except Section 48A-13) or any regulation established under this chapter, the director shall suspend the wrecker driver's permit for a definite period of time not to exceed 60 days.

(b) If at any time the director determines that a permittee is not qualified under Section 48A-13, or is under indictment or has charges pending for any offense involving driving while intoxicated or a felony offense involving a crime described in Section 48A-13(a)(7)(A)(i), (ii), (iii), (iv), or (v) or criminal attempt to commit any of those offenses, the director shall suspend the wrecker driver's permit until such time as the director determines that the permittee is qualified or that the charges against the permittee have been finally adjudicated.

(c) A permittee whose wrecker driver's permit is suspended shall not drive a wrecker for a vehicle tow service inside the city during the period of suspension.

(d) The director shall notify the permittee in writing of a suspension under this section and include in the notice:

(1) the reason for the suspension;

(2) the date the suspension is to begin;

(3) the duration of the suspension; and

(4) a statement informing the permittee of the right of appeal.

(e) The period of suspension begins on the date specified by the director or, in the case of an appeal, on the date ordered by the appeal hearing officer. (Ord. Nos. 19099; 21282; 21435; 24175)

SEC. 48A-24. REVOCATION OF WRECKER DRIVER'S PERMIT.

(a) The director shall revoke a wrecker driver's permit if the director determines that a permittee:

(1) operated a wrecker inside the city for a vehicle tow service during a period when the wrecker driver's permit was suspended;

(2) intentionally or knowingly made a false statement of a material fact in an application for a wrecker driver's permit;

(3) engaged in conduct that constitutes a ground for suspension under Section 48A-23 (a), and, at least two times within the 12-month period preceding the conduct or three times within the 24-month period preceding the conduct, had received either a suspension in excess of three days or a conviction for violation of this chapter;

(4) engaged in conduct that could reasonably be determined to be detrimental to the public safety;

(5) failed to comply with a condition of a probationary permit; or

(6) is under indictment for or has been convicted of any felony offense while holding a wrecker driver's permit.

(b) A person whose wrecker driver's permit is revoked shall not:

(1) apply for another wrecker driver's permit before the expiration of 12 months from the date the director revokes the permit or, in the case of an appeal, the date the appeal hearing officer affirms the revocation; or

(2) operate a wrecker for a vehicle tow service inside the city.

(c) The director shall notify the permittee and the licensee in writing of a revocation and include in the notice:

(1) the specific reason or reasons for the revocation;

(2) the date the director orders the revocation; and

(3) a statement informing the permittee of the right to, and process for, appeal of the decision. (Ord. Nos. 19099; 21282; 21435; 24175)

SEC. 48A-25. WRECKER OPERATION AFTER SUSPENSION OR REVOCATION.

(a) After receipt of a notice of suspension, revocation, or denial of permit renewal, the permittee shall, on the date specified in the notice, surrender the wrecker driver's permit to the director and discontinue operating a wrecker for a vehicle tow service inside the city.

(b) Notwithstanding Section 48A-23(c), Section 48A-24(b), and Subsection (a) of this section, if the permittee appeals a suspension or revocation under this section, the permittee may continue to operate a wrecker for a vehicle tow service pending the appeal unless:

(1) the permittee's wrecker driver's permit is suspended pursuant to Section 48A-23(b) or revoked pursuant to Section 48A-24(a)(6) of this article; or

(2) the director determines that continued operation by the permittee would impose a serious and imminent threat to the public safety. (Ord. Nos. 19099; 21282; 21435; 24175)

SEC. 48A-26. APPEAL FROM DENIAL, SUSPENSION, OR REVOCATION.

(a) If the director denies, suspends, or revokes a wrecker driver's permit, the action is final unless the permittee files an appeal, in writing, with the city manager not more than 10 business days after notice of the director's action is received.

(b) The city manager or a designated representative shall act as the appeal hearing officer in an appeal hearing under this section. The hearing officer shall give the appealing party an opportunity to present evidence and make argument. The formal rules of evidence do not apply to an appeal hearing under this section, and the hearing officer shall make a ruling on the basis of a preponderance of the evidence presented at the hearing.

(c) The hearing officer may affirm, modify, or reverse all or part of the action of the director being appealed. The decision of the hearing officer is final as to available administrative remedies. (Ord. Nos. 19099; 21435; 24175)

ARTICLE IV.

MISCELLANEOUS LICENSEE AND DRIVER REGULATIONS.

SEC. 48A-27. LICENSEE'S AND DRIVER'S DUTY TO COMPLY.

(a) Licensee. In the operation of a vehicle tow service, a licensee shall comply with the terms and conditions of the vehicle tow service license and, except to the extent expressly provided otherwise by the license, shall comply with this chapter, rules and regulations established under this chapter, and other law applicable to the operation of a vehicle tow service.

(b) Driver. While on duty, a driver shall comply with this chapter, regulations established under this chapter, other law applicable to the operation of a motor vehicle in this state, and orders issued by the licensee employing, or contracting with, the driver in connection with the licensee's discharging of its duty under its vehicle tow service license and this chapter. (Ord. Nos. 21435; 24175)

SEC. 48A-28. LICENSEE'S DUTY TO ENFORCE COMPLIANCE BY DRIVERS.

(a) A licensee shall establish policy and take action to discourage, prevent, or correct violations of this chapter by drivers who are employed by, or under contract to, the licensee.

(b) A licensee shall not permit a driver who is employed by, or under contract to, the licensee to drive a wrecker if the licensee knows or has reasonable cause to suspect that the driver has failed to comply with this chapter, the rules and regulations established by the director, or other applicable law. (Ord. Nos. 21435; 24175)

SEC. 48A-29. INSURANCE.

(a) A licensee shall procure and keep in full force and effect automobile liability insurance written by an insurance company that:

(1) is approved by the State of Texas;

(2) is acceptable to the city;

(3) is rated B+ or better, with a financial size of Class VI or higher, by A. M. Best or has an equivalent rating from another insurance rating service approved by the city, unless the insurance company is reinsured for the full insurance required under this section by another insurance company that meets all of the rating requirements of this paragraph and all other requirements of Paragraphs (1), (2), and (4) of this subsection and provides a right of direct action against the reinsurer by any person entitled to claimed insurance benefits against the primary insurance company in the event the primary insurance company does not pay any valid claim; and

(4) does not violate the ownership/ operational control prohibition described in Subsection (j) of this section.

(b) The insurance must be issued in the standard form approved by the Texas Department of Insurance, and all provisions of the policy must be acceptable to the city. The insured provisions of the policy must name the city and its officers and employees as additional insureds. The coverage provisions must provide coverage for any loss or damage that may arise to any person or property by reason of the operation of a vehicle tow service by the licensee, including but not limited to damage to a towed vehicle caused directly or indirectly by improper hookup or improper towing.

(c) The automobile liability insurance must provide combined single limits of liability for bodily injury and property damage of not less than $500,000 for each occurrence, or the equivalent, for each wrecker used by the licensee. Aggregate limits of liability are prohibited.

(d) The insurance for vehicles while being loaded, unloaded, or transported must provide limits of liability of not less than $25,000 for each light duty wrecker and $50,000 for each medium duty or heavy duty wrecker.

(e) If a vehicle is removed from service, the licensee shall maintain the insurance coverage required by this section for the vehicle until the director receives satisfactory proof that all evidence of operation as a wrecker for a vehicle tow service has been removed from the vehicle.

(f) The insurance required under this section must include:

(1) a cancellation provision in which the insurance company is required to notify the director in writing not fewer than 30 days before canceling, failing to renew, or making a material change to the insurance policy;

(2) a provision to cover all vehicles, whether owned or not owned by the licensee, that are operated under the license, except for any vehicle that:

(A) has been subcontracted from another licensee pursuant to Section 48A-7(e) of this chapter; and

(B) is covered by insurance of the other licensee that meets the requirements of this chapter and that includes coverage for use of the vehicle by subcontractors; and

(3) a provision requiring the insurance company to pay every claim on a first-dollar basis.

(g) Insurance required by this section may be obtained from an assigned risk pool if all of the policies and coverages are managed by one agent, and one certificate of insurance is issued to the city.

(h) A license will not be granted or renewed unless the applicant or licensee furnishes the director with such proof of insurance as the director considers necessary to determine whether the applicant or licensee is adequately insured under this section.

(i) If the insurance of a licensee lapses or is canceled and new insurance is not obtained, the director shall suspend the license until the licensee provides evidence that insurance coverage required by this section has been obtained. A person shall not operate a vehicle tow service while a license is

suspended under this section whether or not the action is appealed. A $100 fee must be paid before a license suspended under this section will be reinstated.

(j) No person with any direct or indirect ownership interest in the licensee's vehicle tow service may have any operational control, direct or indirect, in any insurance company that provides insurance required by this section to the vehicle tow service. For purposes of this subsection, "operational control" means holding any management position with the insurance company (including, but not limited to, the chief executive officer, the president, any vice-president, or any person in a decision-making position with respect to insurance claims) or having the right to control the actions or decisions of any person in such a management position in the insurance company. (Ord. Nos. 19099; 21435; 23106; 24175)

SEC. 48A-30. INFORMATION TO BE SUPPLIED UPON REQUEST OF DIRECTOR.

Upon request of the director, a licensee shall submit to the director the following information:

(1) a current consolidated list of vehicles;

(2) a current financial statement that includes a balance sheet and income statement;

(3) names of current officers, owners, and managers; and

(4) a list of current drivers employed by the licensee, with their wrecker driver's permits indicated. (Ord. Nos. 21435; 24175)

SEC. 48A-31. VEHICLE TOW SERVICE RECORDS.

For each vehicle towed by a vehicle tow service, a licensee shall retain any record required pursuant to this chapter, including, but not limited to, towing agreements, photographs, written authorizations for removal, and wrecker slips or tickets, for not less than one year from the date of removal of the vehicle. The licensee shall make the vehicle tow service records available for inspection by the director upon reasonable notice and request. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-32. FAILURE TO PAY AD VALOREM TAXES.

A licensee or an applicant for a vehicle tow service license shall not allow the payment of ad valorem taxes upon any vehicle, equipment, or other property used directly or indirectly in connection with the vehicle tow service to become delinquent. (Ord. Nos. 21435; 24175)

ARTICLE V.

SERVICE RULES AND REGULATIONS.

SEC. 48A-33. REMOVAL OF VEHICLES FROM PUBLIC RIGHTS-OF-WAY.

(a) A licensee commits an offense if, without a valid emergency wrecker service license issued under Chapter 15D of this code, he, either personally or through an employee, subcontractor, or agent, removes a vehicle from:

(1) a public street; or

(2) any area between the property line of private property abutting a public street and the center line of the street's drainage way or the curb of the street, whichever is farther from the property line of the private property.

(b) It is a defense to prosecution under Subsection (a) that the vehicle was removed:

(1) from a portion of public right-of-way leased by the city to the person requesting removal of the vehicle, if such removal was not prohibited by the lease;

(2) by a vehicle tow service currently licensed under this chapter; and

(3) in compliance with all requirements of this chapter and any other applicable city ordinance or state or federal law. (Ord. Nos. 19099; 21435; 23106; 24175)

SEC. 48A-34. REMOVAL OF AUTHORIZED VEHICLES PROHIBITED.

A person commits an offense if he intentionally or knowingly removes or causes the removal of a vehicle, other than an illegally parked or unauthorized vehicle, from private property. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-35. FINANCIAL INTERESTS OF PRIVATE PROPERTY OWNER AND LICENSEE PROHIBITED.

(a) A licensee commits an offense if he, either personally or through an employee, subcontractor, or agent:

(1) directly or indirectly gives anything of value, other than a sign or notice required to be posted under this chapter, to a private property owner in connection with the removal of a vehicle from the private property; or

(2) has a direct or indirect monetary interest in private property from which the licensee for compensation removes an unauthorized vehicle.

(b) An owner of private property commits an offense if he:

(1) accepts anything of value, other than a sign or notice required to be posted under this chapter, from a vehicle tow service in connection with the removal of a vehicle from the private property; or

(2) has a direct or indirect monetary interest in a vehicle tow service that for compensation removes an unauthorized vehicle from the private property.

(c) It is a defense to prosecution under Subsections (a)(2) and (b)(2) that the private property from which the vehicle is removed is a vehicle storage facility licensed under the Texas Vehicle Storage Facility Act. (Ord. Nos. 19099; 21435; 23106; 24175)

SEC. 48A-36. REQUIREMENTS FOR POSTING SIGNS.

(a) A person commits an offense if he removes or causes the removal of a vehicle from private property without signs being posted and maintained on the private property in accordance with this section at the time of towing and for at least 24 hours prior to removal of the vehicle.

(b) Except as otherwise provided by Section 48A-36.2 of this chapter, at least one sign must be placed on the right or left side of each driveway access or curb cut allowing access to the private property. If curbs, access barriers, landscaping, or driveways do not establish definite vehicle entrances onto private property from a public roadway, other than an alley, or if the width of an entrance exceeds 35 feet, signs must be placed at intervals along the entrance so that no entrance is farther than 25 feet from a sign. At least two signs must be placed on the interior of the private property. The director may require one additional interior sign to be posted for each 50 parking spaces over 150 contained on the property.

(c) Each sign required by Subsection (b) to be placed upon private property must:

(1) be approved by the director;

(2) contain:

(A) a bright red international towing symbol, at least four inches high, located on the uppermost portion of the sign or on a separate sign placed immediately above the sign;

(B) the following information immediately below the international towing symbol in white letters on a bright red background:

(i) the words "TOWING ENFORCED" in two-inch high letters; and

(ii) a statement describing who may park at the location and prohibiting all others;

(C) the following information on the next lower portion of the sign in bright red letters at least one inch high on a white background:

(i) the words, "Unauthorized Vehicles Will Be Towed at Owner's or Operator's Expense"; and

(ii) the days and hours towing is enforced at the location, which may be satisfied by a statement that towing is enforced at all times;

(D) the following information on the bottommost portion of the sign in white letters at least one inch high on a bright red background:

(i) the name, street address, and current telephone number, including area code, of the vehicle tow service;

(ii) the name, street address, and current telephone number, including area code, of the vehicle storage facility to which the vehicle will be towed, if different from the vehicle tow service; and

(iii) a telephone number answered 24 hours a day at which a vehicle owner or operator may obtain information to locate the vehicle, if different from the telephone numbers listed in Subparagraph (D)(i) and (D)(ii);

(3) be at least 24 inches tall and 18 inches wide and constructed of a rigid weather-resistant metal;

(4) be permanently mounted on a pole, post, permanent wall, or permanent barrier;

(5) be readable day and night;

(6) be permanently installed on the private property in a manner and location approved by the director so that the sign is facing and conspicuous to any person entering the property; and

(7) be posted so that the bottom edge of the sign is not lower than five feet nor higher than eight feet above ground level.

(d) In addition to the signs required to be posted under Subsection (b) of this section, the following two signs must be posted and maintained on the interior of the private property in a location and manner approved by the director:

(1) The first sign must meet all of the requirements of Subsection (c) of this section, except that all wording must be in Spanish instead of English and the translation must be approved by the director.

(2) The second sign must comply with form, size, color, and wording requirements established by rule or regulation of the director and must include the following information in both English and Spanish:

(A) the maximum towage fees that may be charged under this chapter and a statement that additional storage, preservation, and notification fees may be charged under the Vehicle Storage Facility Act; and

(B) a statement of how and to whom a complaint concerning a vehicle's removal or a violation of this chapter can be made.

(e) A person commits an offense if, on the same private property, he posts or allows the posting of a sign or signs indicating:

(1) the name of more than one vehicle tow service; or

(2) the name, address, or telephone number of more than one vehicle storage facility.

(f) A person commits an offense if he removes or obstructs or allows the removal or obstruction of a sign required by this section to be posted on private property. It is a defense to prosecution under this subsection that the removal or obstruction was caused by:

(1) a city employee in the performance of official duties; or

(2) the property owner or a licensee or driver of a vehicle tow service authorized by the property owner for the purpose of:

(A) repairing or maintaining the sign;

(B) complying with this chapter or a rule or regulation promulgated under this chapter; or

(C) terminating a vehicle tow service agreement for the private property.

(g) A minor variation of a required or minimum height of a sign or lettering is not a violation of this chapter.

(h) It is a defense to prosecution under Subsection (a) of this section that:

(1) before the vehicle was removed, the property owner provided the owner or operator of the vehicle with notice complying with Section 684.012(b) and (c) of the Texas Transportation Code (which requires the notice to be attached to the vehicle and sent certified mail to the vehicle's registered owner), and the vehicle tow service received written verification from the property owner that the required notice was given; or

(2) the vehicle was removed by or under the direction of a peace officer. [Ord. Nos. 19099; 21435; 23106; 24175, § 48A-36(d) effective 2-1-01]

SEC. 48A-36.1. INDIVIDUAL PARKING RESTRICTIONS IN RESTRICTED AREA.

(a) A private property owner who complies with Section 48A-36 of this chapter may impose further specific parking restrictions in an area to which the signs apply for individual spaces by installing or painting a weather-resistant sign or notice on a curb, pole, post, permanent wall, or permanent barrier so that the sign is in front of a vehicle that is parked in the space when the rear of the vehicle is at the entrance of the space.

(b) The top of the sign or notice may not be higher than seven feet above the ground.

(c) The sign or notice must include an indication that the space is reserved for a particular unit number, person, or type of person.

(d) The letters on the sign or notice must be at least two inches in height and must contrast to the color of the curb, wall, or barrier so they can be read during the day and at night. The letters are not

required to be illuminated or made of reflective material. (Ord. Nos. 23106; 24175)

SEC. 48A-36.2. DESIGNATION OF RESTRICTED PARKING SPACES IN OTHERWISE UNRESTRICTED AREA.

If a private property owner wishes to designate one or more spaces as restricted parking spaces on a portion of private property that is otherwise unrestricted as to parking, the owner must, instead of installing a sign at each entrance to the private property as provided by Section 48A-36(b) of this chapter, place a sign that prohibits unauthorized vehicles from parking in the designated spaces and that otherwise complies with Section 48A-36:

(1) at the right or left side of each entrance to the designated area or group of parking spaces located on the portion of the private property on which parking is restricted; or

(2) at the end of each restricted parking space so that the sign, the top of which may not be higher than seven feet above the ground, is in front of any vehicle that is parked in the space when the rear of the vehicle is at the entrance of the space. (Ord. Nos. 23106; 24175)

SEC. 48A-37. AUTHORIZATION FOR REMOVAL.

(a) A person commits an offense if he removes or causes the removal of a vehicle from private property unless, at the time the vehicle is to be removed:

(1) the property owner signs written authorization for removal of the vehicle by the vehicle tow service; or

(2) a current written agreement exists between the property owner and the vehicle tow service authorizing removal of illegally parked or unauthorized vehicles from the property and a photograph is taken reasonably showing that the removed vehicle was unauthorized or illegally parked on the property.

(b) The written authorization for removal required by Subsection (a)(1) must contain:

(1) a description of the vehicle to be removed, including the year, make, model, color, state license plate number, and vehicle identification number of the vehicle;

(2) the date and time of the vehicle's removal;

(3) the location from which the vehicle is removed;

(4) the reasons for removing the vehicle; and

(5) the signature of the property owner.

(c) The written agreement required by Subsection (a)(2) must:

(1) contain a clear election, signed by the property owner or the property owner's duly authorized agent, as to whether the vehicle tow service is authorized to remove illegally parked and unauthorized vehicles from the property 24 hours a day, seven days a week or only during the normal business hours of the property owner; and

(2) be renewed at least every two years and whenever there is a change in ownership of the property. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-38. RELEASE OF A VEHICLE PRIOR TO REMOVAL.

A licensee or permittee commits an offense if he, either personally or through an employee, subcontractor, or agent, fails to release a vehicle without charge to the vehicle owner or operator, or to the property owner, if the release is requested before the vehicle is removed from the private property on which the vehicle is parked. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-39. REMOVAL OF A VEHICLE WITH A WRECKER.

A licensee or permittee commits an offense if he, either personally or through an employee, subcontractor, or agent, removes a vehicle from private property without:

(1) using a wrecker; or

(2) first completing every procedure required to secure the vehicle to the wrecker or wrecker equipment, including the attachment of any safety chains, so that the vehicle may be safely towed. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-40. NOTIFICATION OF POLICE DEPARTMENT; WRECKER SLIPS OR TICKETS.

(a) A licensee or permittee commits an offense if he, either personally or through an employee, subcontractor, or agent, fails to notify the police department and obtain a tow number within

one hour after the removal of each vehicle from private property.

(b) When notifying the police department for the purpose of obtaining a tow number, the licensee or permittee shall provide the following information:

(1) the location from which the vehicle was removed and the date and time of removal;

(2) the reason for removal of the vehicle;

(3) a physical description of the removed vehicle, including the year, make, model, color, state license plate number, and vehicle identification number of the vehicle;

(4) the trade name of the vehicle tow service; and

(5) the name, address, and telephone number of the vehicle storage facility to which the vehicle was taken.

(c) Upon delivering a vehicle to a vehicle storage facility, the licensee shall provide to the vehicle storage facility a copy of a wrecker slip or ticket containing all of the information required in Subsection (b) and the tow number issued by the police department.

(d) A vehicle storage facility commits an offense if, within two hours after accepting a towed vehicle, it fails to report to the police department the information required by Subsections (b)(1), (3), (4), and (5) of this section. (Ord. Nos. 19099; 21435; 23106; 24175)

SEC. 48A-41. NOTIFICATION OF VEHICLE OWNER.

A licensee or permittee shall provide the owner of any vehicle removed from private property by the licensee with written notice of how and to whom a complaint concerning the vehicle's removal or a violation of this chapter can be made. The notice must specifically state that the vehicle owner has the right to challenge the legality of the tow under Chapter 685, Texas Transportation Code, as amended, and describe the process required for the challenge. (Ord. Nos. 21435; 23106; 24175)

SEC. 48A-42. REMOVAL TO VEHICLE STORAGE FACILITY.

(a) A person commits an offense if he removes or causes the removal of any vehicle from private property to:

(1) any location other than the vehicle storage facility indicated on the signs required by Section 48A-36 of this article; or

(2) a vehicle storage facility that:

(A) is not currently licensed under the Texas Vehicle Storage Facility Act or not in compliance with that act or any rule or regulation promulgated pursuant to that act;

(B) is located outside the city or located inside the city in violation of the Dallas Development Code; or

(C) does not have a sign posted conspicuously at its entrance notifying the vehicle owner of the right to challenge the legality of the tow

under Chapter 685, Texas Transportation Code, as amended.

(b) A licensee or a permittee commits an offense if he, either personally or through an employee, subcontractor, or agent:

(1) fails to remove a vehicle from private property to a vehicle storage facility by the most direct and expeditious route; or

(2) stops at another location while transporting a vehicle removed from private property to a vehicle storage facility. (Ord. Nos. 19099; 21435; 23106; 24175)

ARTICLE VI.

FEE SCHEDULE.

SEC. 48A-43. MAXIMUM FEE SCHEDULE.

(a) The maximum fee that a licensee or permittee may charge for vehicle tow service, regardless of whether a tilt-bed wrecker or a conventional wrecker is used, is:

(1) $95 for towage of a vehicle with a manufacturer's gross vehicle weight rating of not more than 10,000 pounds;

(2) $150 for towage of a vehicle with a manufacturer's gross vehicle weight rating of more than 10,000 pounds but not more than 26,000 pounds; and

(3) $350 for towage of a vehicle with a manufacturer's gross vehicle weight rating of more than 26,000 pounds.

(b) No additional fee may be charged for linkage of a vehicle prior to a tow or for the use of dollies or go-jacks.

(c) If a licensee or permittee tows a stolen vehicle, or a vehicle later determined to be stolen, the licensee or permittee may charge the lawful owner of the vehicle no more than the maximum fee for towage. A vehicle tow service may not charge a fee to the police department if the police department takes custody of a stolen vehicle.

(d) A licensee or permittee commits an offense if he, either personally or through an employee, subcontractor, or agent, charges:

(1) more than the maximum fee allowed by this section for the particular vehicle towed; or

(2) any fee in addition to:

(A) a towage fee lawfully charged under this section; or

(B) a storage, preservation, or notification fee lawfully charged under the Vehicle Storage Facility Act.

(e) A licensee or permittee shall provide a vehicle owner the option of paying the fee for vehicle tow service by cash or a major credit card. (Ord. Nos. 19099; 19300; 21435; 23106; 24175)

ARTICLE VII.

VEHICLES AND EQUIPMENT.

SEC. 48A-44. VEHICLES AND EQUIPMENT.

(a) An applicant or licensee shall submit each wrecker to be used in the vehicle tow service for inspection in a manner determined by the director. Each wrecker must:

(1) if used for towing a vehicle with a manufacturer's gross vehicle weight rating of not more than 10,000 pounds, meet the requirements for a light duty wrecker;

(2) if used for towing a vehicle with a manufacturer's gross vehicle weight rating of more than 10,000 pounds but not more than 26,000 pounds, meet the requirements for a medium duty wrecker;

(3) if used for towing a vehicle with a manufacturer's gross vehicle weight rating of more than 26,000 pounds, meet the requirements for a heavy duty wrecker;

(4) carry, as standard equipment, safety chains and a fire extinguisher;

(5) be maintained in a safe and good working condition and contain equipment that is maintained in a safe and good working condition; and

(6) have permanently affixed to each side of the power unit of the wrecker legible letters and numbers, at least two inches high, in a color that contrasts with the power unit, stating the trade name, address (including city and state), and telephone number (including area code) of the vehicle tow service

and the motor carrier registration number of the wrecker.

(b) Upon inspection and approval of each vehicle, the director shall issue a decal to the applicant or licensee. The decal must be affixed securely to the lower right corner of the windshield of the inspected wrecker.

(c) The director or a peace officer may, at any time, inspect a wrecker used by a licensee for vehicle tow service to determine whether the vehicle complies with this section.

(d) A licensee or permittee commits an offense if he, either personally or through an employee, subcontractor, or agent, uses a light duty, medium duty, or heavy duty wrecker to tow a vehicle that exceeds the manufacturer's gross vehicle weight rating allowed to be towed by the particular wrecker under Subsection (a)(1), (2), or (3), whichever is applicable. (Ord. Nos. 19099; 21435; 23106; 24175)

ARTICLE VIII.

ENFORCEMENT.

SEC. 48A-45. AUTHORITY TO INSPECT.

(a) The director or a peace officer may inspect any vehicle tow service or vehicle storage facility to determine whether the licensee or permittee complies with this chapter, regulations established under this chapter, or other applicable law.

(b) A licensee or permittee, either personally or through an employee, subcontractor, or agent, shall not attempt to interfere or refuse to cooperate with the director or a peace officer in the conduct of any

investigation or discharge of any duty pursuant to this chapter. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-46. ENFORCEMENT BY POLICE DEPARTMENT.

Officers of the police department shall assist in the enforcement of this chapter. A police officer upon observing a violation of this chapter, or of any regulation established by the director pursuant to this chapter, shall take necessary enforcement action to insure effective regulation of vehicle tow service and vehicle storage facilities. (Ord. Nos. 19099; 21435; 24175)

SEC. 48A-47. CORRECTION ORDER.

(a) If the director determines that a licensee, either personally or through an employee, subcontractor, or agent, violates this code, the terms of its license, a regulation established by the director, or other law, the director may notify the licensee in writing of the violation and by written order direct the licensee to correct the violation within a reasonable period of time. In setting the time for correction, the director shall consider the degree of danger to the public health or safety and the nature of the violation. If the violation involves equipment that is unsafe or functioning improperly, the director shall order the licensee to immediately cease use of the equipment.

(b) If the director determines that a violation constitutes an imminent and serious threat to the public health or safety, the director shall order the licensee to correct the violation immediately, and, if the licensee fails to comply, the director shall promptly take or cause to be taken such action as the director considers necessary to enforce the order immediately.

(c) The director shall include in a notice issued under this section an identification of the specific violation, the date of issuance of the notice and the time period within which the violation must be corrected, a warning that failure to comply with the order may result in suspension or revocation of license or imposition of a fine or both, and a statement indicating that the order may be appealed to the city manager. (Ord. Nos. 21435; 24175)

SEC. 48A-48. SERVICE OF NOTICE.

(a) A licensee shall designate and maintain a representative to receive service of notice required under this chapter to be given a licensee.

(b) Notice required under this chapter to be given to:

(1) a licensee must be personally served by the director on the licensee or the licensee's designated representative; or

(2) a driver permitted by the city under Article III must be personally served or sent by certified United States Mail, five day return receipt requested, to the address, last known to the director, of the person to be notified.

(c) Notice required under this chapter to be given a person other than a driver permitted under Article III or a licensee may be served in the manner prescribed by Subsection (b)(2).

(d) Service executed in accordance with this section constitutes notice to the person to whom the notice is addressed. The date of service for notice that is mailed is the date received. (Ord. Nos. 21435; 24175)

SEC. 48A-49. APPEAL.

(a) A licensee may appeal a correction order issued under Section 48A-47 if an appeal is requested in writing not more than 10 days after notice of the order or action is received.

(b) The city manager or a designated representative shall act as the appeal hearing officer in an appeal hearing under this section. The hearing officer shall give the appealing party an opportunity to present evidence and make argument. The formal rules of evidence do not apply to an appeal hearing under this section, and the hearing officer shall make a ruling on the basis of a preponderance of evidence presented at the hearing.

(c) The hearing officer may affirm, modify, or reverse all or a part of the order of the director. The decision of the hearing officer is final. (Ord. Nos. 21435; 24175)

SEC. 48A-50. OFFENSES.

(a) A person commits an offense if he violates a provision of this chapter applicable to him. A culpable mental state is not required for commission of an offense under this chapter unless the provision defining the conduct expressly requires a culpable mental state. A separate offense is committed each day in which an offense occurs. An offense committed under this chapter is punishable by a fine of not less than $200 nor more than $500. The minimum fine established in this subsection shall be doubled for the second conviction of the same offense within any 24-month period and trebled for the third and subsequent convictions of the same offense within any 24-month period. At no time shall the minimum fine exceed the maximum fine established in this subsection.

(b) Prosecution for an offense under Subsection (a) does not prevent the use of other enforcement remedies or procedures applicable to the person charged with the conduct or involved in the offense. (Ord. Nos. 19099; 19963; 21435; 24175)